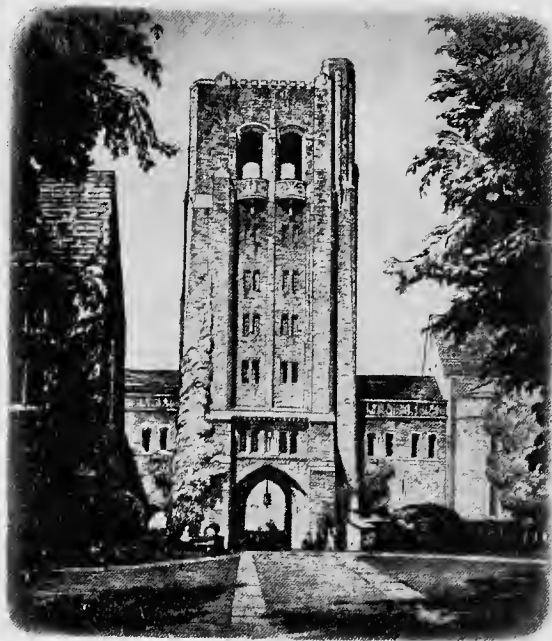


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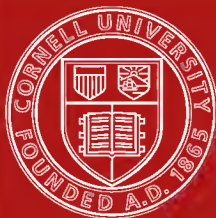
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The Law of Suretyship

COVERING

Personal Suretyship, Commercial Guaranties,
Suretyship as Related to Bonds to
Secure Private Obligations,
Official and Judicial Bonds,
Surety Companies

By

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Third Edition by

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Chicago Kent College of Law

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PREFACE TO THIRD EDITION

In order to meet the demand for a modern text on the law of suretyship this revision is presented. The publication has been brought down to date, with reference to the later decisions and new application of principles. The effort has been to put into the work the last expression of the law on the subjects discussed in its pages.

“Striving to better, oft we mar what’s well,” has ever been kept in mind by the editor. Changes in the text have been made only where considered absolutely necessary. Professor Stearns’ original text has the distinguished merit of lucidity, both in analysis and statement. The text discusses the fundamental principles underlying the law of suretyship, with exceptions to, explanations and applications of, the principles, together with the leading decisions announcing and supporting each, as well as the contrary contentions, doctrines, and holdings. The revision shows that although the law of suretyship is not a closed subject, the rules applicable to corporate or compensated suretyship are essentially the same as those applicable to the law of insurance. The arrangement of the subject-matter in this edition follows the same order as the former editions, with the same classified numbering.

The chapter in the first edition on “Suretyship as Related to Negotiable Instruments,” omitted in the second edition, has also been omitted in this edition. The adoption in most states of the Uniform Negotiable Instruments Act or Code has superseded the law of suretyship as heretofore applied to negotiable instruments, and has substituted therefor the law as declared by the Act or Code itself.

“Stearns’ Cases on Suretyship” has also been re-edited and revised. The cases are carefully selected and cover the subjects. The cases added are selected as to importance, clarity, and controlling authority at the present time.

WELLS M. COOK.

Chicago, July 31, 1922.

CONTENTS

CHAPTER I.

THE CONTRACT.

SECTION.	PAGE.
1. Suretyship defined	1
2. The nature of the contract	2
3. Personal suretyship	3
4. Real suretyship	3
5. Parties to the contract	4
6. Surety and guarantor distinguished	5
7. Indorser	7
8. Irregular or anomalous indorser	7
9. Irregular indorsement before and after delivery.....	9
10. Irregular indorser held only as indorser.....	10
11. Who may become promisors in suretyship.....	12
11a. Disability of the principal	12c
12. Disability by statute	12c
13. Surety companies	12d
14. Duress	12d
15. Fraud in the making of the contract.....	13
16. Consideration	15
17. Suretyship contract must be express.....	17
18. Ambiguous words.—How interpreted	18
19. Estoppel of promisor to deny recitals in the contract.....	20
20. Incompleted contracts of suretyship	21
21. Statutory requirements	22
22. Contracts in suretyship executed by agents.....	23
23. Suretyship by operation of law	24
23a. The execution of the contract.....	25a

CHAPTER II.

THE STATUTE OF FRAUDS.

24. The purpose of the statute of frauds.....	26
25. The English statute	27
26. Meaning and scope of the word "agreement".....	29
27. Same subject continued.—American decisions.....	30
28. The "Memorandum or Note"	33
29. Same subject continued	34
30. The signature to the memorandum	36

SECTION.	PAGE.
31. "Special Promise" to whom made	37
32. Same.—Applied to contracts of indemnity.....	37
33. Same subject continued	38
34. Same subject continued.—American decisions.....	40
35. All contracts of suretyship are within the statute of frauds....	41
36. Credit given wholly to promisor	42
37. Joint liability of promisor and another	43
38. Discharge of original debtor	44
39. Consideration beneficial to promisor.—Co-existing liability of another is not always a test of suretyship.....	45
40. Promise to pay debt of another out of property of debtor in promisor's hands	46
41. Release of liens and securities by creditor as basis of original promise	48
42. Promise to pay pre-existing liability of promisor not within the statute	49
43. Assumption of vendor's debt as part of purchase price not within the statute	51
44. Contract of Del Credere agent not within the statute.....	51
45. Pleading transactions within the statute.—Plaintiff's allegations.	52
46. Pleading statute as a defense	52
47. Lex Fori—The statute of frauds remedial.....	54

CHAPTER III.

COMMERCIAL GUARANTIES.

48. Scope of the subject	55
49. Construction of contracts of guaranty	56
50. Construction of equivocal or ambiguous words.....	59
51. General guaranty	63
52. Special guaranty	64
53. Guarantor for one principal not held for joint principals.....	65
54. Guarantor for joint principals not held for one.....	65
55. Retrospective guaranties	66
56. Guaranty without knowledge of principal debtor.....	67
57. Consideration	67
58. Form of guaranty	69
59. Continuing guaranties	70
60. Same subject continued	72
61. Absolute guaranties	73
62. Guaranty of collectibility	74
63. Test of due diligence	75
64. Notice to guarantor of acceptance of the guaranty and advance- ments thereon	77

SECTION.	PAGE.
65. Federal court rule as to notice of acceptance of guaranty.....	80
66. Rule of the State courts as to notice of acceptance of guaranty..	83
67. Notice of guarantor of default of principal.....	85
68. Cases in which notice to guarantor of default is necessary.....	89
69. Joint and several guaranties	92
70. Guaranty covers interest	93
71. Revocation of guaranty	94

CHAPTER IV.

SURETYSHIP DEFENSES.

72. Material alteration of principal contract	98
73. Same subject continued	99
74. Same subject continued	102
75. Alteration of principal contract by the addition of new parties.....	105
76. Alteration of principal contract by a change in the duties of the principal	106
76a. Building contracts	107a
77. Variation in amount of advancements under limited guaranty.—	
76b. Building contracts.—Changes in the manner of payment.....	107e
Effect upon guarantor	108
78. Change of parties	109
79. Alterations beneficial to the surety or guarantor.....	110
80. Alterations enlarging the principal liability.....	113
81. Discharge of promisor by extension of time.....	114
82. Agreement for extension must be for a consideration.....	115
83. Payment of advance interest as a consideration for extension....	117
84. Agreement for extension must be for a definite time.....	119
85. Extension of time by the execution and delivery of a note for the debt payable at a later date.....	119
86. Collateral securities maturing at a later date.....	120
87. Extension of time by Act of Legislature.....	121
88. Giving time to surety. Effect upon co-surety.....	122
89. Giving time is not a defense if the surety is fully indemnified....	123
90. Extension of time as a defense to persons who are in the situation of a surety	124
91. Extension by appeal or continuance in judicial proceedings.....	127
91a. Extension of time a defense under negotiable instrument Codes..	128
92. Extension of time with reservation of rights against the surety.....	128b
93. Agreement not to sue as distinguished from agreements to extend.—Effect upon surety	129
94. Waiver of the defense of extension of time.....	130
95. Delay of the creditor in pursuing remedies against the principal as a defense to the surety or guarantor.....	131
96. Payment or other satisfaction as a discharge of the surety or guarantor	133

SECTION.	PAGE.
97. Liability against surety or guarantor revived if payment or substituted security is void	135
98. Voluntary release of security held by the creditor or upon which the creditor has a lien	137
99. Release of securities by the misconduct of the creditor.....	140
100. Release of securities by operation of law.....	143
101. Release by the creditor of property of principal in his possession or control, but not held as security for the suretyship debt..	145
102. Whatever releases principal will release the surety or guarantor.	146
103. Same subject.—Release of principal by operation of law.....	147
104. Same subject.—In cases where the release by operation of law is not the result of the fault or procurement of the creditor...	149
105. Suretyship obligations obtained by fraud of the creditor.....	150
106. Same subject.—Concealment or non-disclosure of facts by the creditor	152
107. Discharge of promisor by failure to disclose facts coming to the knowledge of the creditor, after the execution of the contract	156
108. Fraud and misconduct of the principal.....	158
109. Misconduct of the principal, by delivering suretyship obligations without complying with conditions	159
110. Suretyship contracts made in reliance upon promises of the creditor	162
111. Conditional contracts of suretyship.—Parol evidence not competent to show conditions	163
112. Same subject.—Parol evidence competent in certain cases.....	166
113. Release of promisor by the creditor.....	168
114. Release of a co-promisor by the creditor.....	170
115. Defense of the promisor based upon the failure of the creditor to sue the principal when requested	173
116. Same subject.—The doctrine of <i>Pain vs. Packard</i>	176
117. The principal's right of set-off or counterclaim against the creditor as a defense to the promisor.....	178
118. Defense based upon the right of the promisor to control the application of collateral	181
119. Revocation.—Death of the promisor	184

CHAPTER V.

BONDS TO SECURE PRIVATE OBLIGATIONS.

120. Private obligations distinguished from official duty in public office ..	189
121. A bond is a specialty.—Form and execution.....	190
122. The signing and sealing of a bond.....	191
123. Delivery and acceptance are necessary to the validity of a bond..	194
124. Incomplete bonds.—Right of the obligee to fill blanks.....	195

SECTION.	PAGE.
125. The incorporation of other instruments into the bond by reference	196
126. Consideration	198
127. Bonds obtained by fraud or misrepresentation	200
128. Parol evidence in aid of construction	202
129. Commencement and duration of liability upon a bond	204
130. Bonds of general indemnity	206
131. Bonds to secure building contracts, with covenants for the payment of labor and material claims	207
132. Alteration of the principal contract as a defense to sureties upon the bond	211
133. Alterations in bond as a defense to the sureties	214
134. Surety upon bond estopped from denying the recitals of the bond	215
135. Measure of damages upon breach of the conditions of a bond	217
136. Same subject.—Where the penalty or forfeiture is imposed by statute	220
137. Interest as an element in the measure of damages	222
138. Bonds to induce violation of law are void	222
139. Bonds to prevent performance of public duty or to induce acts in violation of public duty are void	225
140. Discharge of surety upon a bond by payment or acts equivalent to payment	226
141. Statutes of limitations as a defense to sureties upon a bond	227
142. As to who are proper parties in an action upon a bond	231
143. Joinder of parties plaintiff	233
144. Joinder of parties defendant	234

CHAPTER VI.

OFFICIAL BONDS.

145. Who are public officers	237
146. The duty of a public officer to give a bond arises from statute	241
147. Bond of deputies	244
148. Qualifications and approval of sureties	246
149. The signing of the bond by the principal	248
150. Liability of sureties as affected by failure to deliver or furnish the bond within the time required by law	249
151. Sureties upon official bonds discharged by alterations to which they do not consent	252
152. Alteration in the duties of the principal by amendment to the law	253
153. Extension of tenure of office by legislative act	256
154. Special bonds given by officers who have also given general bonds	257
155. Concealment of matters material to the risk	258
156. Bonds of public officers not retroactive and cover only the period named in the bond	259

SECTION.	PAGE.
157. Same subject.—Where the wrongful act was partly in one and partly in another term	263
158. Second bond given in the same term cumulative.....	263
159. Liability of surety for the negligence or error in judgment of a public officer	264
160. Liability of sureties for failure of public officer to account for the use of public funds	265
161. Sureties not liable for defaults of principal in not performing his contracts with persons dealing with him in his official capacity	269
162. Sureties upon official bonds are not released by the negligence or misconduct of other officials	270
163. Sureties not liable for failure to account for money received by the principal outside the scope of his office.....	271
164. Liability upon bond of sheriff or constable for trespass and other wrongs committed colore officii	274
165. View that sureties are not liable for wrongs of sheriff or constable committed colore officii	279
166. Liability for loss of public money by failure of the bank used as public depository	280
167. Liability for loss of public money by theft or robbery.....	284
168. Liability against judicial officers acting without jurisdiction..	287
169. Liability of judicial officers for ministerial acts.....	291
170. Liability of principal for acts of his deputy.....	293
171. Liability on bond of a notary public.....	294
172. Defenses in actions upon bonds of public officers.....	294
173. Presumption that official duty has been performed.....	297
174. Evidence against sureties on official bonds.....	298
175. Same subject.—Judgment against principal as evidence against the surety	300
176. Same subject.—View that judgment against the principal is prima facie evidence against the surety.....	302
177. Same subject.—View that judgment against the principal is conclusive against the surety.....	303
178. Limitations upon actions against sureties on official bonds.....	305

CHAPTER VII.

JUDICIAL BONDS.

179. Suretyship in the application of legal remedies.....	308
180. Bonds for stay of execution or appeal.....	312
181. Statutory requirements as to appeal or stay bonds.....	314
182. Irregularities or defects whereby bonds are invalidated.....	317
183. Immaterial defects in the contract	319
184. Failure to perfect the appeal	320
185. Conditions upon which appeal or stay bonds become payable....	322

SECTION.	PAGE.
186. Same subject.—Affirmance by failure to prosecute appeal.....	324
187. As to when action may be brought upon bond for appeal.....	327
188. Measure of damages in an action upon an appeal or stay bond.....	329
189. Successive appeal bonds	334
190. Defenses in actions upon appeal bonds.—Estoppel.....	335
191. Appeal from a justice court	336
192. Bonds to procure injunction	337
193. When action for damages upon an injunction bond accrues.....	339
194. Construction of bonds to procure injunction.....	343
195. Defenses of sureties upon injunction bonds.....	344
196. Measure of damages for breach of injunction bond.....	346
197. Same subject.—Defendant's expenses in procuring a dissolution of injunction	348
198. Attachment bonds	350
199. Attachment bonds not forfeited for irregularities of execution or defects in form	352
200. Whether damages for malicious prosecution are recoverable upon bond to procure attachment	353
201. Forthcoming or redelivery bonds	355
202. Bonds to discharge attachment	356
203. When action accrues upon bonds in attachment.....	358
204. Good faith of the plaintiff, or probable cause for attachment not a defense in actions upon bonds.....	361
205. Sureties estopped from questioning the regularity of the proceed- ings out of which their liability arises.....	362
206. Exoneration of sureties in attachment proceedings.....	363
207. Attachment bonds are available in any court to which the case is taken on appeal.....	364
208. Measure of damages in actions upon attachment bonds.....	365
209. Replevin bonds	367
210. Conditions of bonds in replevin.....	368
211. Bonds in replevin which are void.....	368
212. What constitutes a breach of a replevin bond.....	369
213. Sureties upon replevin bonds are concluded by the final order in the replevin action.....	370
214. Measure of damages in action upon replevin bond.....	371
215. Defenses in action on replevin bonds.....	373
216. Bonds given in the course of the administration of estates of deceased persons	375
217. Duties for which executors and administrators are chargeable on their bonds.....	375
218. The scope of the administration bond covers all assets and equi- ties of the estate.....	378
219. Successive administration bonds are cumulative.....	380
220. As to whether judgment or order of court against the principal is necessary to a cause of action on the administration bond.....	381
221. The sureties upon the bond of an administrator are concluded by judgment against the principal.....	383

SECTION.	PAGE.
222. Defenses to action upon administration bonds.....	384
223. Who may maintain action on administration bonds.....	385
224. Bonds of guardians—Scope of liability.....	386
225. Settlement of guardians' accounts.—Release of sureties on the bond	388
226. An adjudication against the guardian is conclusive against the sureties	389
227. Bonds given in the course of insolvency proceedings.....	390
228. Bail bonds	391
229. Conditions in bail bonds.—Time of appearance.....	392
230. Same subject.—Place of appearance.....	394
231. Defenses against bail bonds.....	395
232. Discharge or exoneration of bail.....	397

CHAPTER VIII.

CORPORATE SURETYSHIP.

233. Surety companies.—Compensated suretyship	401
234. Private and corporate suretyship compared.....	408
235. Corporate suretyship and insurance compared.....	409
236. Corporate suretyship as affected by the premium or compensa- tion paid	410
237. Corporate compensated suretyship is within the statutes of frauds	412
238. Construction of corporate suretyship contracts.....	413
239. Surety company bonds as affected by the special stipulations in- serted for their protection in the contract.....	416
240. Same subject.—Stipulation that the obligee shall notify the surety of an act of the principal that "may" involve loss upon the bond	417
241. Stipulations discharging surety if claim is not made within a designated time	420
242. Stipulation that the amount paid by surety upon the bond shall be conclusive against the principal in an action by the surety against the principal for indemnity.....	421
243. Contract of the compensated surety valid only as a collateral undertaking	422
243a. Joint-control of trust funds.....	424

CHAPTER IX.

THE RIGHTS AND REMEDIES OF THE PROMISOR AFTER PAY- MENT.

244. Subrogation	426
245. Subrogation arises only when claim is paid in full.....	430
246. Subrogation is a mere equity and will not be applied against the legal rights of others dealing with the principal.....	432

SECTION.	PAGE.
247. The promisor who pays is entitled to have the securities held by the creditor assigned to him.....	434
248. Subrogation extends not only to securities but also to all remedies of the creditor.....	435
249. Surety paying judgment against the principal will be subrogated to the lien and other rights of the creditor under the judgment	440
250. A suretyship promisor who pays will be subrogated to any mortgage security which the creditor holds for the debt.....	444
251. Subrogation applies to one in the situation of a surety.....	447
252. Surety who pays the debt is entitled to be subrogated to a pro rata share of any dividend which is derived from the assets of the principal	450
253. Subrogation among co-sureties.....	453
254. Subrogation between successive sureties.....	454
255. Subrogation in favor of the creditor to securities held by the surety	455
256. Same subject.—The view of the English courts.....	463
257. Remedies of the surety in cases where he is deprived of subrogation by act of the creditor.....	465
258. When surety will be subrogated to the principals' claims of set-off against the creditor	466
259. Subrogation not available to one who pays the debt of another as a mere volunteer	467
260. Conventional subrogation	470
261. Waiver of subrogation	472
262. Contribution between co-sureties.—General principles	473
263. Contribution between sureties bound by different instruments...	477
264. A surety for a surety not liable in contribution.....	480
265. Contribution as affected by special contract between sureties...	481
266. Contribution between persons in the situation of a surety.....	482
267. One who becomes surety at the request of a co-surety is liable in contribution to such co-surety.....	483
268. One who aids in the commission of the default is barred from the right of contribution.....	485
269. When contribution may be enforced.....	486
270. Equitable contribution or the right of a surety to call upon his co-surety for exoneration before payment.....	488
271. Amount recoverable in contribution.....	489
272. Contribution as affected by the insolvency of one or more co-sureties	490
273. Contribution as affected by absence from the jurisdiction or by the death of a co-surety.....	490
274. Surety seeking contribution must account to his co-sureties for indemnity furnished him by the principal.....	491
275. Surety may enforce contribution even though payment by him was without compulsion	495

SECTION.	PAGE.
276. Contribution as affected by the release of one or several co-sureties	498
277. Bankruptcy of a surety.—Effect on co-surety's right of contribution	499
278. Contribution between parties to bills and notes.	501
279. The right of indemnity against the principal.	503
280. When right of indemnity arises.	507
281. Equitable exoneration	508
282. Right of indemnity arises from payment or transactions equivalent to payment	509
283. Amount recoverable by indemnity proceedings.	511
284. Right of indemnity as affected by the non-liability of the principal	513
285. Right of indemnity as affected by the non-liability of the surety or guarantor	515
286. When judgment against the surety or guarantor is conclusive as to the right to recover indemnity.	517
287. Indemnity as affected by the bankrupt of the principal.	517

THE LAW OF SURETYSHIP.

CHAPTER I.

THE CONTRACT.

- Sec. 1. Suretyship Defined.
- Sec. 2. The Nature of the Contract.
- Sec. 3. Personal Suretyship.
- Sec. 4. Real Suretyship.
- Sec. 5. Parties to the Contract.
- Sec. 6. Surety and Guarantor Distinguished.
- Sec. 7. Indorser.
- Sec. 8. Irregular or Anomalous Indorser.
- Sec. 9. Irregular Indorsement Before and After Delivery.
- Sec. 10. Irregular Indorser Held Only as Indorser.
- Sec. 11. Who May Become Promisors in Suretyship.
- Sec. 11a. Disability of the Principal.
- Sec. 12. Disability by Statute.
- Sec. 13. Surety Companies.
- Sec. 14. Duress.
- Sec. 15. Fraud in the Making of the Contract.
- Sec. 16. Consideration.
- Sec. 17. Suretyship Contract Must be Express.
- Sec. 18. Ambiguous Words—How Interpreted.
- Sec. 19. Estoppel of Promisor to Deny Recitals in the Contract.
- Sec. 20. Incompleted Contracts of Suretyship.
- Sec. 21. Statutory Requirements.
- Sec. 22. Contracts in Suretyship Executed by Agents.
- Sec. 23. Suretyship by Operation of Law.
- Sec. 23a. The Execution of the Contract.

§1. Suretyship defined.

Suretyship embraces all forms of obligations to pay the debt or answer for the default of another.¹

¹ "Suretyship is an accessory agreement by which one binds himself for another already bound." *Hough vs. Aetna Life Ins. Co.*, 57 Ill. 318, 11 Am. Rep. 18. The desirability of defining legal terms, by giving to them, so far as possible, their generally accepted meaning in popular discourse, will

be conceded. The word "Surety," however, has acquired a general and a special meaning. In general, it means a security of any sort, and, outside of legal phrase, has such accepted meaning. As a special term of the law it is restricted to a security of a certain

The person who is so bound in a contract of suretyship is called either a Surety, a Guarantor or an Indorser. It is not strictly accurate, although in common use, to employ the expression "Suretyship and Guaranty."

Guaranty is a subdivision of suretyship. The term describes the obligation assumed by one who becomes a Guarantor in a suretyship relation. This obligation is different in some important respects from the contract made by the Surety and Indorser, yet each are promisors in a suretyship contract.

§2. The nature of the contract.

No one incurs a liability to pay a debt or perform a duty for another unless he expressly agrees to be so bound. The law does not create relations of this character by mere implication. Suretyship arises only² in contract, and such a contract to be binding must be entered into for a consideration, must be duly executed between parties competent to contract, and without duress or fraud and must be in writing.³

The early adjudications in suretyship treated the contract as one of great burden to the promisor, because of the fact that it was usually entered into for accommodation merely, and without any participation in the benefits of the principal contract.

kind. No good reason is apparent why the broader term suretyship, when carried into legal parlance, should also be given a restricted meaning. Bouvier says: "*Suretyship* is a primary obligation to see that the debt is paid, while guaranty is a collateral undertaking." This invention of the distinguished lexicographer has been followed by many and rejected by many, with the result that the word, suretyship, is being used in a double sense in our law. The authority cited by Bouvier (*Dole vs. Young*, 24 Pick. 250) does not sustain his use of the word. The case merely defines guaranty and the word

"suretyship" is not used at all.

² Involuntary suretyship, resulting from the operation of law, is not an obligation to pay the debt of another imposed by implication, or by the law, but is merely extending the privileges of suretyship to parties already bound. (Post Sec. 23.)

³ *Ingersoll vs. Baker*, 41 Mich. 48.

The English Statute of Frauds (29 Chas. II., Chap. 3) has been substantially re-enacted in all the states, and provides that no action shall be brought to charge anyone upon a promise to pay the debt of another, unless the agreement is in writing. (See Post, Chap. 2.)

These facts were not without their influence upon courts, and gave rise to a line of precedents of strict construction against the one claiming under a suretyship contract.⁴

In addition to the fact that the promisor in a suretyship contract usually derived no benefit from it, the attention of courts has always been specially directed to the peculiar position of the obligor, in that his liability is fixed by the default of another over whose conduct he may not be able to exercise any control.

The nature of the contract invokes equitable considerations in the construction without, however, excluding the rules for the construction of ordinary contracts.

§3. Personal suretyship.

Agreements of persons, real or artificial, to pay the debt of another may be denominated Personal Suretyship, in distinction from obligations in rem, or the use of *property*, real or personal, as a security for debt.

§4. Real suretyship.

The term real suretyship, or obligation resting upon specific property as a security for debt, is a legal fiction, but a very useful one. It expresses the rights which one person acquires in specific property of another to secure a debt, and is a convenient classification in suretyship.

⁴ Lord Arlington vs. Merricke, 2 Saund. 412; Law vs. East India Co., 4 Ves. Jr. 824; Hassell vs. Long, 2 M. & S. 363; London Assurance Co. vs. Bold, 6 Ad. & Ell. 514; Chase vs. McDonald, 7 Har. & John. 160; Miller vs. Stewart, 9 Wheat. 680; Magee vs. Manhattan Life Ins. Co., 92 U. S. 98. Swayne, J.: "A surety is 'a favored debtor.' His rights are zealously guarded both at law and in equity. The slightest fraud on the part of the creditor, touching the contract, annuls it. Any alter-

ation after it is made, though beneficial to the surety, has the same effect. His contract exactly as made is the measure of his liability; and, if the case against him be not clearly within it, he is entitled to go acquit."

Barnes vs. Barrow, 61 N. Y. 42; Kingsbury vs. Westfall, 61 N. Y. 360; Nat. Mechanics' Banking Assn. vs. Conkling, 90 N. Y. 116; Anderson vs. Bellenger, 87 Ala. 334; 6 South. 82; State vs. Medary, 17 O. 554.

We generally say that a person has a lien upon property, rather than say certain property is under an obligation to a person. But lien includes other transactions than pledge and mortgage, which are the particular subjects of real suretyship.⁵

§5. Parties to the contract.

It requires three parties to make a contract of personal suretyship, (a) the one for whose account the contract is made, whose debt or default is the subject of the transaction, and who is called the principal; (b) the one to whom the debt or obligation runs, the obligee in suretyship, called the creditor; (c) the one who agrees that the debt or obligation running from the principal to the creditor shall be performed, and who undertakes on his own part to perform it, called the promisor.⁶

⁵ The law frequently substitutes its own will for the agreement of parties in the creation of liens or obligations resting upon property, such as judgment liens and other liens created by statute. The "estate by elegit," created by one of the early Westminster Statutes in England, is a further illustration. By this statute, it was provided that after one has a judgment for his debt he may have a writ entitling him to the possession of one half the defendant's lands to be held until the judgment is fully paid.—III Blackstone 418.

⁶ A general term which shall include Surety Guarantor and Indorser, is useful in stating the Law of Suretyship. Some needless confusion has arisen in cases where a general principle of suretyship was involved, but which involved no necessary construction of the exact character of the promisor, by the failure to discriminate between the different obligations which are imposed by the contract of the Surety

and Guarantor, and by using the terms interchangeably, as if they were legal synonyms.

In *Wendlandt vs. Sobre*, 37 Minn. 162, 33 N. W. 700, the court is reported as saying: "A surety is any person who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have paid it before the surety was compelled to do so." The law, as thus stated, is not peculiar to a Surety, but is applicable also to one who is a Guarantor, and, with some modifications, to an Indorser, and the court doubtless intends to be so understood, but has used the term "Surety" in a general sense as inclusive of other forms of obligation in suretyship.

A more pronounced anomaly occurs in *People vs. Backus et al.*, 117 N. Y. 196, 22 N. E. 759, where the Court uses the expression "*the sureties* when they signed their *guaranty*" meaning no doubt Guarantors instead of Sureties. This

§6. Surety and guarantor distinguished.

A Surety undertakes to pay the debt of another. A Guarantor undertakes to pay if the principal debtor does not⁷ or cannot. A Surety joins in the contract of the principal, and becomes an original party with the principal. The Guarantor does not join in the contract of his principal but engages in an independent undertaking.^{7a} A Surety promises to do the same thing which the principal undertakes; the Guarantor promises that the principal will perform his agreement and if he does not, then he, the Guarantor, will do it for him.

The liability of the Surety is immediate and direct. He agrees that he will perform the principal contract, fixing upon himself the responsibility from the beginning. If, however,

was an action upon an agreement reading as follows: "In consideration of the making the deposits by the People of the State of New York in the First National Bank of Auburn, in the agreement mentioned, and for value received, we, the undersigned, B, K and H, do hereby jointly and severally *guarantee* the full and punctual performance of the condition of said agreement on the part of said bank. . . . The said *Guarantors* may serve upon the comptroller a written notice, terminating or limiting their liability under this *guaranty*, etc." The court in construing this instrument employs the word "Sureties" in referring to the obligors.

The use of the word "Surety" as descriptive of any form of promise to pay the debt of another seems to be firmly fixed in the layman's vocabulary, and not altogether eradicated from judicial parlance. See also *Singer Mfg. Co. vs. Littler*, 56 Iowa, 601; 9 N. W. 905, where the expression "The Surety in a Contract of Guaranty" is used.

Even the Supreme Court of the United States, with the exceptional care used by that tribunal in weigh-

ing well its words, has said: "A contract of guaranty is the obligation of a surety." *Davis vs. Wells*, 104 U. S. 169.

7 "I hereby guarantee the prompt payment of the within note," represents a note as valid and binding. The liability of the guarantor is not dependent on the prosecution of a suit against the maker of the note, nor dependent on the validity or legality of the note. If the payment is not made by the maker within the time fixed in the note there is a breach of the guaranty, on which a liability exists, regardless of the fact that no steps have been taken against the principal. Suit may be brought against the guarantor in the first instance. *Holm vs. Jamieson*, 173 Ill. 295, 50 N. E. 702.

In every case we must look to the terms of the guaranty and the circumstances under which it was made to ascertain the character and extent of the undertaking." *Welsh vs. Ebersole*, 75 Va. 656.

7a *News-Times Pub. Co. vs. Doolittle*, 51 Colo. 386 (118 P. 974); *Saint vs. Wheeler*, 95 Ala. 363, 10 So. 539; *Bedford vs. Kelley*, 173 Mich. 492, 139 N. W. 250.

the promise is that the principal will pay or that the debt is collectible, or that the principal is solvent, then the liability is not immediate, and does not fix upon the promisor a liability from the beginning, but only upon default or failure of the principal to do what it is agreed he shall do. In such a case the promisor is a Guarantor.

Both the Surety and Guarantor agree to pay the debt of another, but the liability to pay in the case of the Surety starts with the agreement, whereas, the liability of the Guarantor does not start with the agreement, except as a contingent liability, and is established for the first time by the default.⁸ The contract of the Surety is more burdensome to the promisor than the contract of the Guarantor, the form of the latter's contract in some cases giving him the benefit of notice, and the right to require the creditor to exercise diligence in pursuing the principal; advantages which the Surety never has.⁹

⁸ Atwood vs. Lester, 20 R. I. 660; 40 Atl. 866; LaRose et al. vs. The Logansport Natl. Bank et al., 102 Ind. 332, 1 N. E. 805; Markland Mining & Mnf'g. Co. vs. Kimmel et al., 87 Ind. 566; White's Adm. vs. Life Assn. of America, 63 Ala. 423; Harris v. Newell, 42 Wis. 687; Milroy vs. Quinn et al., 69 Ind. 406; Coleman vs. Fuller, 105 N. C. 328, 11 S. E. 175; Hall vs. Weaver, 34 Fed. 104; Northern State Bank vs. Bellamy, 19 N. D. 509, 125 N. W. 888.

Legal proceedings are not necessary to fix the liability of a guarantor, nor is it necessary to prove demand upon the maker, or notice to the guarantor of non-payment, or to use diligence against the maker, except where the guarantor guarantees the collection of a sum of money, in which latter case the guarantor is only liable in case holder is unable to collect by legal process. Ill. Surety vs. Munro, 289 Ill. 574, 124 N. E. 528.

⁹ A very catchy phrase was once written down by somebody which was made to read: "A Surety undertakes to pay if the debtor *does not*. A Guarantor undertakes to pay if the debtor *can not*." This phrase has rhythm and euphony and by its literary excellence seems to

have captivated legal writers and jurists (a) from the very start. The phrase, however, will not stand analysis; both conditions "if the debtor does not" and "if the debtor cannot" belong to and are descriptive of the Guarantor, and neither one of the Surety. The condition "if the debtor does not" if applied to the Surety, could only mean the Surety is *not* liable if the debtor *does* pay, which, of course, imposes no condition, and is meaningless as a legal expression. There are no conditions in the contract of the Surety other than those which are in the principal's contract. The distinction between absolute and conditional guaranty must not be overlooked. Sometimes stated as guaranty of payment and guaranty of collectibility. The contract of the absolute Guarantor of payment carries by necessary implication the agreement to pay "*if the other does not*" and this without any reference to whether the other *can* pay;

§7. Indorser.

An Indorser is one who signs a negotiable instrument for the purpose of passing title; one also may become an Indorser by special contract, although not in the chain of title. In either of these relations, the Indorser is a party to a suretyship contract.

The adoption in most States of the Uniform Negotiable Instruments Act or Code has superseded the law of suretyship as heretofore applied to negotiable instruments, and has substituted therefor the law as declared by the Act or Code itself.

§8. Irregular or anomalous indorser.

The indorsement for accommodation, which includes all indorsements not in the chain of title, is called irregular or anomalous indorsement. This latter classification includes not only those accommodation parties who, by special contract, assume the position of an Indorser, but also those indorsements which, either by special contract or operation of law, result in the liability of a Surety or Guarantor.

The irregular indorsement in blank in some jurisdictions is held to create no other liability than that of the Indorser,¹⁰ but in the most of the states in this country a more flexible rule is in force, whereby such promisor is held liable either as Surety, Guarantor or Indorser, depending upon the special contract made,¹¹ but if the indorsement is irregular and if no special contract is shown, and it does not appear whether the signature was affixed before or after delivery of the principal's contract, the liability is fixed by a presumption of fact, and

whereas, the Guarantor of collectibility is an agreement that the other will *be able* to pay and the default is not fixed by the mere fact that the other *does not* pay. This distinction is wholly disregarded in some of the earlier cases, see *Rudy vs. Wolf*, 16 Serg. & R. 79 (1827); see *Beardsley vs. Hawes*, 71 Conn. 39 (1898) in which the distinction is clearly made. See *post*, Secs. 61, 62.

(a) *Kramph's Executrix v. Hatz's Executors*, 52 Pa. St. 525; *McIntosh-Huntington Co. vs. Reed*, 89 Fed. Rep. 464.

¹⁰ *Bank of Luverne vs. Sharp*, 152 Ala. 589, 44 So. 871; *Haddock, Blanchard & Co. vs. Haddock*, 192 N. Y. 499, 85 N. E. 682; *Aldred's Estate*, 229 Pa. 627, 79 Atl. 141; *Tucker vs. Mueller*, 287 Ill. 551, 122 N. E. 847.

¹¹ *Good vs. Martin*, 95 U. S. 90; *Ryan vs. Security Savings & Commercial Bank*, 271 Fed. 366; *Jameison vs. Citizens Nat. Bank*, 130 Md. 75, 99 Atl. 994; *Merchants Nat. Bank vs. Smith*, 59 Mont. 280, 196 Pac. 523; *Richards vs. Market Exch. Bank*, 81 Ohio St. 348, 90 N. E. 1000. See *post*, Sec. 91a.

in this respect the rules are at variance in different states.¹² This presumption of fact, however, may be rebutted by parol and the real contract established.¹³ This seems to be the rule in all the states excepting Massachusetts and Minnesota, where the presumption as to the anomalous indorser being a Surety is conclusive.¹⁴ If, however, it is shown that the accommodation party signed, not for the purpose of giving the maker credit with the payee, but to enable the maker or the payee to discount

¹² There is a marked difference between the relation of the parties to a formal contract of suretyship or a true mercantile guaranty and that of the parties to other supposedly analogous contracts, such as endorsers of commercial paper, indemnitors, and mortgagors who have sold the equity of redemption. The existence of a primary and secondary liability does not of itself create a suretyship, although it frequently confers a portion at least of the equities which the surety has definitely acquired.

Nowhere in the Uniform Negotiable Instruments Act is the term "surety" mentioned, and its provisions are so inconsistent with the laws of suretyship that they can not be reconciled.

All persons liable on a negotiable instrument are comprehended in one or the other of two classes. Section 192 provides: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other persons are 'secondarily' liable."

In *Merchants' Nat. Bank vs. Smith*, 59 Mont. 280, 196 Pac. 523, 15 A. L. R. 430, it is said: "If the primary purpose of this Act was to secure uniformity in the Law of Negotiable Instruments, as is generally conceded to be the fact, it is inconceivable that the failure of the Act to mention suretyship is to be charged up merely as a *casus*

omissus. It seems clear to us that it was the purpose of the legislation to supersede the law of suretyship as theretofore applied to negotiable instruments, and to substitute therefor the law as declared by the Act itself, and this is the view expressed by the courts quite generally. *Union Trust Co. vs. McGinty*, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525; *Jameson vs. Citizens Nat. Bank*, 130 Md. 75, 99 Atl. 994, Ann. Cases 1918A, 1097; *Bradley Engineering & Mfg. Co. vs. Heyburn*, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170; *Oklahoma State Bank vs. Seaton (Okla.)*, 170 Pac. 477; *Lumbermen's Nat. Bank v. Campbell*, 61 Oregon 123, 121 Pac. 427; *Richards vs. Market Exch. Bank*, 81 Ohio St. 348, 26 L. R. A. (N.S.) 99, 90 N. E. 1000.

Contra—*Fullerton Lbr. Co. vs. Snouffer et al.*, 139 Iowa 176, 117 N. W. 50.

¹³ *Seymour vs. Mickey*, 15 O. S. 515; *Good vs. Martin*, 95 U. S. 90; *Ives vs. Bosley*, 35 Md. 262.

¹⁴ *Wright vs. Morse*, 9 Gray 337; *Way vs. Butterworth*, 108 Mass. 509.

It seems, however, that the Mass. Courts have modified the statement of the text to the extent of admitting proof to rebut this presumption where it appears that the promisor signed after delivery.

Peckham & Spencer vs. Gilman &

the paper with some third party, such promisor will be held as an Indorser, unless a distinct agreement to be otherwise bound is shown.¹⁵ Such would be the position of the accommodation Indorser upon a note payable to the maker's own order, for such indorsement would, of a necessity, be inoperative until indorsed by the payee, thus placing the accommodation party in the situation of a second Indorser.¹⁶

Whenever the character of the indorsement is fixed to be that of Surety, Guarantor or Indorser, either by operation of a presumption or by proof, the suretyship feature of the contract controls its construction the same as in other relations of suretyship.

§9. Irregular indorsement before and after delivery.

An Irregular Indorser of negotiable paper before delivery stands in a different suretyship relation to the other parties than that of an irregular Indorser after delivery. The indorsement before delivery may be supported by the same consideration as the principal contract,¹⁷ whereas an accommodation indorsement after delivery cannot be supported by such consideration and must stand upon some new and independent consideration.¹⁸ An accommodation indorsement before delivery generally results in the contract of a Surety and such indorsement after delivery generally results in the contract

Co., 7 Minn. 446; Robinson vs. Bartlett et al., 11 Minn. 410.

See also Massey vs. Turner, 2 Houst. (Del.) 79; Benton vs. Willard, 17 N. H. 593.

¹⁵ Rey et al. vs. Simpson, 22 How. 341; Good vs. Martin, 95 U. S. 95; Greenough vs. Smeed, 3 O. S. 416.

¹⁶ Blatchford vs. Milliken, 35 Ill. 434; Dubois vs. Mason, 127 Mass. 37; First Natl. Bank vs. Payne, 111 Mo. 291, 20 S. W. 41; Chicago Trust & Savings Bank vs. Nordgren, 157 Ill. 663; 42 N. E. 148; Hately vs. Pike, 162 Ill. 241, 44 N. E. 441. But compare Ewan vs. Brooks Wa-

terfield Co., 55 O. S. 596, 45 N. E. 1094. See Post Sec. 133.

¹⁷ Dillman vs. Nadelhoffer, 160 Ill. 121, 43 N. E. 378; Favorite Admr. vs. Stidham, 84 Ind. 423.

¹⁸ Pratt vs. Hedden, 121 Mass. 116; Joslyn vs. Collinson, 26 Ill. 62; Sawyer vs. Fernald, 59 Me. 500; Badger vs. Barnabee, 17 N. H. 120; Clopton, Exr. vs. Hall, 51 Miss. 482; Savage vs. First National Bank, 112 Ala. 508, 20 South. 398; Beebe vs. Moore, 3 McLean 387; Briggs vs. Downing & Matnews, 48 Iowa 550.

of a Guarantor, except when made in pursuance of some prior agreement.¹⁹ This is brought about either by operation of law, or by the special form in which the contract is expressed.

The main reason is that an indorsement after delivery is necessarily collateral in its nature, and the language employed to express such a contract will generally disclose a clear intent to make a guaranty.

The presumptions referred to in the preceding section will not prevail where the fact of signing before or after delivery is shown. In Ohio, for instance, the presumption is that the irregular Indorser signed after delivery, and he is accordingly presumed to be a Guarantor.²⁰ If, however, he is shown to have signed before delivery he is held as Surety.²¹

In Missouri, he is presumed to be a Surety²² but if the fact of signing after delivery is shown he is held as Guarantor.²³

§10. Irregular indorser held only as indorser.

The more rational rule as to the irregular indorser is undoubtedly that which has prevailed in Pennsylvania since 1855, the date of the enactment of the present Statute of Frauds, where such promisor is conclusively presumed to be a second Indorser,²⁴ except in cases where the exact nature of the contract is set out in the instrument itself, or in some other writing showing the agreement upon which the indorsement

¹⁹ *Moies vs. Bird*, 11 Mass. 436; *Leonard vs. Wildes*, 36 Me. 265.

²⁰ *Champion and Lathrop vs. Griffith*, 13 O. 228; *Robinson vs. Abell et al.*, 17 O. 36; *Greenough vs. Smeed*, 3 O. S. 418.

²¹ *Bright vs. Carpenter*, 9 O. 139; *Seymour & Co. vs. Mickey*, 15 O. S. 515; *Ewan vs. The Brooks-Waterfield Co.*, 55 O. S. 596; 45 N. E. 1094. The negotiable instruments acts in Ohio and many other states now provide that a person so placing his name on the back of paper by blank indorsement is deemed an indorser and can not be held in any other capacity. *Rockfield et al. vs. The First National Bank*, 77 O. S. 311; 83 N. E. 392.

²² *Schneider vs. Schiffman*, 20 Mo. 571.

²³ *Adams vs. Huggins*, 73 Mo. App. 140.

²⁴ *Hauer & McNair vs. Patterson*, 84 Pa. 274; *Schafer vs. Farmers' & Mechanics' Bank*, 59 Pa. 144; *Temple vs. Baker*, 125 Pa. 634; 17 Atl. 516. The legislature of Pennsylvania in 1901 enacted a statute which provides that the irregular indorser, signing in blank before delivery, if the instrument is payable to the order of a third person, is liable to the payee and all subsequent parties, except that when he signs for the accommodation of the payee he is only liable to subsequent parties.

was made.²⁵ Such a rule, if uniform, would fix the status of negotiable paper, and would enable it to circulate more freely as money. Any other basis results in chaos and contradictions.

To permit a party to negotiable paper to show with what intent or purpose he signed, upon the theory that he is rebutting some presumption, and thereby establishing the "real contract," has no reasonable foundation, is not scientific, and is a constant restraint upon the usefulness of commercial paper. If one signs in the form used by the regular Indorser, and in the place where the regular Indorser signs, he might well be held always to that contract and avoid all confusion.^{25a}

In New York he is presumed to be a second Indorser, but if it be shown that he signed before delivery for the purpose of giving the maker credit with the payee, his position is shifted to that of a first Indorser, and so liable to the payee.²⁶

In many states the anomalous indorser is liable to the payee without any other proof of intent than that which is implied from the signing before delivery.^{26a}

²⁵ Eilbert vs. Finkbeiner, 68 Pa. 243.

^{25a} In New Jersey the blank signature of the anomalous indorser does not import a contract of any sort, and it is necessary to show by proof the kind of contract made. Chaddock vs. Vanness, 35 N. J. L. 517.

²⁶ Phelps vs. Vischer, 50 N. Y. 69. Such also appears to be the rule in Wisconsin, Cady vs. Shepard, 12 Wis. 639; also in Indiana, Browning et al. vs. Merritt et al., 61 Ind. 425.

^{26a} Alabama—(Liable to the payee with privileges of an indorser.) Milton vs. DeYampert, 3 Ala. 643; Price vs. Lavender, 38 Ala. 389; Alabama Nat. Bank vs. Rivers, 116 Ala. 1; 22 South. 560.

Arkansas—(Surety.) Killian vs. Ashley, 24 Ark. 511; Heise vs. Bumpass, 40 Ark. 547.

California—(Guarantor with privileges of an indorser.) Riggs vs. Waldo, 2 Cal. 485; Jones vs. Goodwin, 39 Cal. 493; Fessenden vs. Summers, 62 Cal. 486.

Colorado—(Surety.) Good vs. Martin, 1 Col. 165; Tabor vs. Miles, 5 Col. App. 127; 38 Pac. 64.

Connecticut—(First indorser and liable to payee.) Spencer vs. Allerton, 60 Conn. 410; 22 Atl. 778. (Statutory.)

Delaware—Surety.) Gilpin vs. Marley, 4 Houst. 284.

Georgia—(Surety.) Collins vs. Everett, 4 Ga. 266; Camp vs. Simmons, 62 Ga. 73. (Statutory.)

§11. Who may become promisors in suretyship.

In general, any one who has the capacity to bind himself in any contract may do so in suretyship. Such promisor must be of sound mind and under no disability, such as infancy or coverture, and the transaction must be free from fraud or duress.

Illinois—(Indorser.) *Tucker vs. Mueller*, 287 Ill. 551, 122 N. E. 847.

Iowa—(Guarantor.) *Robinson vs. Reed*, 46 Ia. 219; *Conger vs. Babbet*, 67 Ia. 13; 24 N. W. 569. (Statutory.)

Kansas—(Guarantor.) *Fullerton vs. Hill*, 48 Ks. 558; 29 Pac. 583.

Kentucky—(Guarantor.) *Arnold vs. Bryant*, 8 Bush 688. (Statutory.)

Louisiana—(Surety.) *Lawrence vs. Oakley*, 14 La. 389; *Chorn vs. Merrill*, 9 La. Ann. 533; *Collins vs. Trist*, 20 La. Ann. 348.

Maine—(Surety.) *Leonard vs. Wildes*, 36 Me. 265; *Sturtevant vs. Randall*, 53 Me. 149; *First Nat. Bank vs. Marshall*, 73 Me. 79.

Maryland—(Surety.) *Ives vs. Bosley*, 35 Md. 262; *Walz vs. Alback*, 37 Md. 404; *Schroeder vs. Turner*, 68 Md. 506; 13 Atl. 331.

Massachusetts—(Joint maker.) *Chaffee vs. Jones*, 19 Pick. 263; *Way vs. Butterworth*, 108 Mass. 509.

Michigan—(Surety.) *Wetherwax vs. Paine*, 2 Mich. 559; *Rothschild vs. Grix*, 31 Mich. 150; *Moynahan vs. Hanaford*, 42 Mich. 329; 3 N. W. 944; *Gunz vs. Geigling*, 108 Mich. 295; 66 N. W. 48.

Minnesota—(Surety.) *Peckham vs. Gilman*, 7 Minn. 446; *Stein vs. Passmore*, 25 Minn. 256.

Missouri—(Surety.) *Schneider vs. Schiffman*, 20 Mo. 571; *Chaffee vs. Memphis Ry.*, 64 Mo. 193.

Nebraska—(Surety.) *Salisbury vs. First Nat. Bank*, 37 Neb. 872; 56 N. W. 727.

New Hampshire—(Surety.) *Sargent vs. Robbins*, 19 N. H. 572; *Currier vs. Fellows*, 27 N. H. 366.

Nevada—(Guarantor.) *Van Doren vs. Tjader*, 1 Nev. 380.

North Carolina—(Surety.) *Baker vs. Robinson*, 63 N. C. 191.

Ohio—(Surety.) *Bright vs. Carpenter*, 9 O. 139; *Greenough vs. Smead*, 3 O. S. 415; *Ewan vs. Brooks-Waterfield Co.*, 55 O. S. 596; 45 N. E. 1094. By Statute (Sec. 8169, General Code) enacted in 1902, the irregular indorser signing before delivery is deemed an indorser and entitled to demand and notice and liable to the payee and all subsequent parties. See also 15 Ohio Law Reporter 580.

Pennsylvania—In 1901 the legislature of Pennsylvania provided as follows: "When a person not otherwise a party to an instrument, places thereon his signature in blank, before delivery, he is liable as endorser in accordance with the following rules: 1. If the instrument is payable to the order of a third person, he is liable to the payee and all subsequent parties. 2. If the instrument is payable to the order of the maker or drawer or is payable to bearer, he is liable to all parties subsequent to the maker

An insane person can not bind himself by a suretyship contract even though the creditor who accepted him as such had no knowledge of the unsoundness of his mind.²⁷

Such contract by an infant is voidable²⁸ and becomes valid only when ratified by him after reaching maturity, and with knowledge that he was not bound by the original transaction.²⁹

Married women in some states may become promisors in suretyship by reason of statutes giving to them the same power to contract, as men.³⁰ When such statutes do not exist, they cannot become bound to pay the debt of another.³¹

A corporation may bind itself in suretyship, if done in the regular course of its business,³² or whenever such a contract is

or drawer. 3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

Rhode Island—(Surety.) Perkins vs. Barstow, 6 R. I. 507.

South Carolina—(Surety.) Carpenter vs. Oaks, 10 Rich. L. 17; McCelvey vs. Noble, 12 Rich. L. 167.

Tennessee—(Guarantor.) Harding vs. Waters, 6 Lea 324. Overruling Comparee vs. Brockway, 11 Humph. 355, and Clowston vs. Barbieri, 4 Sneed 335.

Texas—(Surety.) Latham vs. Houston Flour Mills, 68 Tex. 127; 3 S. W. 462.

But see Horton vs. Manning, 37 Tex. 23.

Utah—(Surety.) McGee vs. Connor, 1 Utah, 92.

Vermont—(Surety.) Strong vs. Riker, 16 Vt. 555.

Virginia—(Guarantor.) Watson vs. Hurt, 6 Gratt. 633; Orrick vs. Colston, 7 Gratt. 189.

West Virginia—Burton vs. Hansford, 10 W. Va. 470.

The presumption of liability to the payee may be rebutted in all

the foregoing States, and an understanding of the parties that the anomalous indorser was to be liable only as second indorser may be shown, except where the rule results from statute.

²⁷ Van Patton & Marks vs. Beals & Hammer, 46 Iowa 62.

²⁸ Harner vs. Dipple, 31 O. S. 72; Williams vs. Harrison, 11 S. C. 412; Curtin vs. Patton, 11 Serg. & R. 305.

²⁹ Owen vs. Long, 112 Mass. 403; Fetrow vs. Wiseman, 40 Ind. 148. *Contra*—Anderson vs. Soward, 40 O. S. 325.

³⁰ Low Bros. & Co. vs. Anderson, 41 Iowa 476; Mayo vs. Hutchinson, 57 Me. 546.

³¹ Gosman vs. Cruger, 69 N. Y. 87. In some states by statute a wife can not act as surety for her husband. People's Bank of Greensboro vs. Steinhart, 65 So. 60; Manor Nat. Bank vs. Lowery, 242 Pa. 559, 89 Atl. 678; Burr vs. Beckler, 264 Ill. 230, 106 N. E. 206. She can so charge her separate estate. Perkins vs. Elliott, 23 N. J. Eq. 526; Stone vs. Billings, 167 Ill. 170, 47 N. E. 372; Hershizer vs. Florence, 39 Ohio St. 516.

³² Phila. & P. R. Co. vs. Knight et al., 124 Pa. St. 58, 16 Atl. 492; Harrison vs. Union Pacific Ry. Co., 13 Fed. Rep. 522; Heims Brewing

necessary in order to carry out a power expressly conferred,³³ but an officer of a corporation cannot bind the corporation as such promisor, unless in pursuance of a direct authority from the corporation.³⁴

A partnership can become a promisor in suretyship by its firm name,³⁵ but one partner cannot so bind such firm without express authority, except where such contract is within the usual scope of the business of the firm,³⁶ or the other members of the firm afterwards ratify the contract by acting upon it.³⁷ The unauthorized signing of the firm name to such contract will bind the individual member of the firm who affixes such signature.³⁸

Co. vs. Flannery et al., 137 Ill. 309; 27 N. E. 286; Pollitz vs. Pub. Util. Comm., 96 O. S. 49; 117 N. E. 149, L. R. A. 1918D, 166; Depot Realty Syndicate Co. v. Enterprise Brewing Co., 87 Or. 560; 170 Pac. 294; L. R. A. 1918C, 1001; Broadway National Bank vs. Baker, 176 Mass. 294; 57 N. E. 603; Timm vs. Grand Rapids Brewing Co., 160 Mich. 371; 125 N. W. 357. It is held in Western Maryland Railroad Co. vs. Blue Ridge Hotel Co., 102 Md. 307; 62 Atl. 351, that a railroad company has no implied power to guarantee interest and dividends upon bonds and stocks of a hotel company, although the latter is operated beneficially to the railroad by increasing its regular income from transportation. See also J. P. Morgan & Co. vs. Hall & Lyon, 34 R. I. 273; 83 A. 113; Re Romadka Bros Co., 216 Fed. 113; Winterfield vs. Cream City Brewing Co., 96 Wis. 239; 71 N. W. 101. A lumber company may become surety on the bonds of a building contractor to induce him to purchase of the lumber company the lumber used in such building. Central L. Co. vs. Kelter, 201 Ill. 503; 66 N. E. 543.

But see Best Brewing Co. vs. Klassen, 185 Ill. 37; 57 N. E. 20. The Brewing Co. executed a bond in

appeal for one of its customers. The appeal was in furtherance of its own business interests. Held to be *Ultra Vires*, and that the surety was not estopped from asserting such defense.

³³ Green Bay and Minn. R. R. Co. vs. Union Steamboat Co., 107 U. S. 98; 2 Fed. 221; Arnot vs. Erie Ry. Co., 67 N. Y. 315.

-But see Davis vs. Old Colony R. R., 131 Mass. 258.

³⁴ Culver vs. Reno Real Estate Co., 91 Pa. St. 367. But if the corporation has the power to engage in an undertaking of guaranty, the power of the executive officer to execute the contract will be presumed. Lloyd & Co. vs. Mathews, 223 Ill. 477; 79 N. E. 172.

³⁵ Allen vs. Morgan, 5 Humph. (Tenn.) 624.

³⁶ Davis vs. Blackwell, 5 Ill. App. 32; Osborn vs. Stone, 30 Minn. 25; 13 N. W. 922; Avery vs. Rowell, 59 Wis. 82; 17 N. W. 875; McQuewans vs. Hamlin, 35 Pa. St. 517; Seufert vs. Gille, 230 Mo. 453; 131 S. W. 102.

³⁷ Crawford vs. Sterling, 4 Esp. 207; Sandilands vs. Marsh, 2 Barn. & Ald. 673.

³⁸ Whitaker vs. Richards, 134 Pa. St. 191; 19 Atl. 501.

A national banking corporation cannot contract in suretyship,³⁹ except that it may enter into such relation in the regular course of its business by transferring by indorsement commercial paper. The National Banking act gives to every bank the authority to exercise "such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt."⁴⁰ This statute gives to banks an implied power to become Surety or Guarantor whenever it becomes necessary in negotiating commercial paper in the due course of their business.⁴¹

§11a. Disability of the principal.

The promisor is bound by his contract, even though the principal, by reason of infancy or coverture, or other incompetency, is not bound. Notwithstanding the disability of the principal, in the absence of fraud the debt remains in force and is valid, and its burden must be assumed by the promisor.^{41a}

§12. Disability by statute.

Where a certain class of persons are prohibited by statute from entering into particular forms of suretyship, the promisor will be bound notwithstanding the prohibition. These statutes furnish a justification to public officers in refusing to accept such prohibited persons as Sureties and Guarantors, and, in some cases, render the promisor liable to proceedings

³⁹ Nat. Bank of Gloversville vs. Wells, 79 N. Y. 498; Knickerbocker vs. Wilcox, 83 Mich. 200; 47 N. W. 123.

⁴⁰ U. S. Rev. St., Sec. 5136. The execution of a bond by a national bank as surety in a replevin suit is beyond its powers and void. Bailey vs. Farmers Nat. Bank, 97 Ill. App. 66.

⁴¹ Peoples Bank vs. Nat. Bank, 101 U. S. 183; Thomas vs. Bank, 40 Neb. 501; 58 N. W. 943.

^{41a} Lionberger vs. Krieger, 88 Mo. 160; Weare vs. Sawyer, 44 N. H. 198; Winn vs. Sanford, 145 Mass. 302; 14 N. E. 119; Gates vs. Tebbets, 83 Neb. 573; 119 N. W. 1120; Kyger vs. Sipe, 89 Va. 507; 16 S. E. 627; Adler vs. State, 35 Ark. 517; Lee vs. Yandell, 69 Tex. 34; 6 S. W. 665; Mitchell vs. Hydraulic Stone Co., Tex. Civ. App.; 129 S. W. 148; Holm vs. Jamieson, 173 Ill. 295; 50 N. E. 702. See *post*, Section 104.

in contempt of court for entering upon such contracts in defiance of statutes and rules of court, but the principle of estoppel will prevent an evasion of liability on the ground of the prohibition.⁴²

§13. Surety companies.

The organization of corporations for the purpose of becoming Sureties and Guarantors upon bonds is sanctioned by the courts in all the states,⁴³ and statutes regulating their acceptance as sole Surety have been enacted in many states. The courts take Judicial notice of the Statutes authorizing Surety companies to be accepted as Sole Surety,⁴⁴ but a state has no power to prescribe rates of premium to be charged since a surety company is in every sense a private business.^{44a}

§14. Duress.

A Surety or Guarantor who enters into his contract under duress is not bound by it, and, in this respect, contracts in suretyship follow the rule of other contracts.⁴⁵ Whether or not the promisor is bound in case of duress practiced upon the principal alone has not been uniformly settled. The argument is advanced that Suretyship depends at all times upon the existence of a valid subsisting principal contract between the principal and creditor, and that to hold the promisor and not the principal violates this axiom of suretyship.⁴⁶

⁴² *Holandsworth vs. Commonwealth*, 11 Bush (Ky.) 617; *State vs. Findley*, 101 Mo. 368; 14 S. W. 111; *Cook vs. Caraway*, 29 Kan. 41; *Tessier vs. Crowley*, 17 Neb. 207; 22 N. W. 422; *Ohio & Miss. Ry. vs. Hardy*, 64 Ind. 454; *Kohn Bros. vs. Washer*, 69 Tex. 67; 6 S. W. 551; *State of Kansas vs. United States Fidelity and Guaranty Co.*, 81 Kan. 660; 106 Pac. 1040.

⁴³ *Cramer vs. Tittle*, 72 Cal. 12; 12 Pac. 869; *Gans vs. Carter & Aiken*, 77 Md. 1; 25 Atl. 663; *Travis vs. Travis*, 48 Hun 343; 1 N. Y. S. 357; *Steel vs. Auditor General*,

111 Mich. 381; 69 N. W. 738; *Bank of Tarboro vs. Fidelity and Deposit Co.*, 128 N. C. 366; 38 S. E. 908.

⁴⁴ *Miller vs. Matthews*, 87 Md. 464; 40 Atl. 176. See *post*, Chapter VIII.

^{44a} *American Surety Co. vs. Shallenberger*, 183 Fed. 636.

⁴⁵ *Ingersoll vs. Roe*, 65 Barb. 346.

⁴⁶ *Wilkenson vs. Hood*, 65, Mo. App. 491; *State vs. Brantley et al.*, 27 Ala. 44; *Hawes vs. Merchant*, 1 Curt. 136; *Patterson vs. Gibson*, 81 Ga. 802; 10 S. E. 9; *Owens vs. Mynatt*, 1 Heisk. (Tenn.) 675; *Walton vs. American Surety Co.*, 264 Pa. 272; 107 Atl. 725 (1919); 68 American Law Register 383 (1920), reviewing controlling cases.

Such reasoning appears eminently sound. Furthermore, if the promisor pays the debt his equitable right of indemnity could be enforced against the principal, and we get as a result the anomaly of the principal maintaining a successful defense against the creditor, and then responding to the same claim at the suit of the promisor. The weight of the authority is that duress of the principal will discharge the promisor except when he signs with knowledge of the duress.⁴⁷

§15. Fraud in the making of the contract.

(1) Fraud practiced by the creditor upon the principal in the making of the main contract stands upon the same reasoning as the duress of the principal. If the principal could rescind for fraud, the promisor in suretyship should be permitted to assert the same right.⁴⁸

(2) Fraud practiced by the creditor upon the promisor, or by the principal upon the promisor with the knowledge of the creditor, will discharge the promisor.⁴⁹ The creditor owes

⁴⁷ Hazard vs. Griswold, 21 Fed. Rep. 178; Peacock et al. vs. The People, 83 Ill. 331; Haney vs. People, 12 Colo. 345; 21 Pac. 39; Graham vs. Marks, 98 Ga. 67; 25 S. E. 931; Griffith vs. Sitgreaves, 90 Pa. St. 161; Schuster vs. Arena, 84 A. 723; 83 N. J. L. 79.

As to duress in the execution of bail bonds in criminal proceedings, see Oak vs. Dustin, 79 Me. 23; 7 Atl. 815; Huggins vs. People, 39 Ill. 241; Peacock vs. People, 83 Ill. 331.

Contra—Robinson vs. Gould, 11 Cush. 55.

Even where surety has notice of the duress practiced on the principal the courts have allowed the defense. "The relation between parent and child and husband and wife are so close and tender that the law recognizes that threats to imprison one will have substantially the same effect on the mind of the other, and what will deprive the one of the

free exercise of his will or judgment will have a like effect on the other." Fountain vs. Bigham, 235 Pa. 35; 84 Atl. 131.

⁴⁸ Putnam vs. Schuyler, 4 Hun (N. Y.) 166; Osborn vs. Robbins, 36 N. Y. 365; Bennett vs. Carey, 72 Iowa 476; 34 N. W. 291; City Natl. Bank vs. Jordan, 130 Iowa 499; 117 N. W. 758.

Contra—Plummer et al. vs. The People, 16 Ill. 358; Ettlinger vs. National Surety Co., 221 N. Y. 467; 117 N. E. 945; 3 A. L. R. 865.

In Evans vs. Keeland, 9 Ala. 42, it is held that a surety can not avail himself of the defense of fraud practiced by the creditor on the principal, unless the principal himself repudiates the transaction.

⁴⁹ Evans vs. Keeland, 9 Ala. 42; Waterbury vs. Andrews, 67 Mich. 281; 34 N. W. 575; Weed vs. Bentley, 6 Hill (N. Y.) 56; Roper et al. vs. Sangamon Lodge No. 6, 91 Ill. 518; Ham vs. Greve, 34 Ind. 18;

a duty of good faith to the promisor and he is required not merely to refrain from misrepresentation and deceit, but a concealment of facts which if known to the promisor would have prevented his entering into the contract, or which increases the risk of the undertaking will amount to fraud,⁵⁰ as where one accepts a Surety upon a bond for the faithful performance of the duties of his agent who had previously while in his employ embezzled his property. If he withholds this information from the Surety, although not specifically inquired about, he cannot enforce the obligation.⁵¹ The rule is carried to the extreme in a case where a cashier of a bank was a defaulter, but this fact was not known to the bank, who thereafter accepted a Surety for the faithful performance of his duty as cashier, and the reports of the assets and liabilities of the bank, published in accordance with the acts of Congress, showed the assets of the bank to be intact, held: that since the bank directors might have discovered the prior default by the exercise of reasonable diligence, that it was a fraud upon the

Trammell vs. Swan, 25 Tex. 473; Bank vs. Railway Co., 65 Iowa 692; 22 N. W. 929; Meek vs. Frantz, 171 Pa. 632; 33 Atl. 413; Campbell vs. Johnson, 41 O. S. 588; Satterfield vs. Spier, 114 Ga. 127; 39 S. E. 930; First Nat. Bank vs. Mattingly, 92 Ky. 650; 18 S. W. 940; Putney vs. Schmidt, 16 N. M. 400 (120 P. 720); Sewell vs. Breathitt Lodge, 150 Ky. 542; 150 S. W. 677.

⁵⁰ Booth vs. Storrs et al., 75 Ill. 438; Pidcock vs. Bishop, 3 Barn. & Cr. 605; Owen vs. Homan, 3 Macn. & G. 378; Comstock vs. Gage, 91 Ill. 328; Barnes v. Savings Bank, 149 Iowa 367; 128 N. W. 541; Lingenfelter Bros. vs. Bowman, 137 N. W. 946; 156 Ia. 649.

⁵¹ Owen vs. Homan, 3 Macn. & G. 378; Franklin Bank vs. Steven, 39 Me. 532; Sooy vs. State, 39 N. J. Law, 135; Warren et al., vs. Branch et al., 15 W. Va. 21; Railton vs.

Mathews, 10 Cl. & Fin. 934; Franklin Bank vs. Cooper, 36 Me. 179; Dougherty vs. Savage, 28 Conn. 146; Screwman's Benev. Assn. vs. Smith, 70 Tex. 168; 7 S. W. 793; Dinsmore vs. Tidball et al., 34 O. S. 411; Lee vs. Jones, 17 C. B. N. S. 482; Guardian Fire Assurance Co. vs. Thompson, 68 Cal. 208; 9 Pac. 1; Third Nat. Bank vs. Owen, 101 Mo. 558; 14 S. W. 632; Remington S. M. Co. vs. Kezertee, 49 Wis. 409; 5 N. W. 809; W. C. & A. Railroad Co. vs. Ling, 18 S. C. 116.

Contra—Home Ins. Co. vs. Holway, 55 Iowa 571; 8 N. W. 457; Domestic S. M. Co. vs. Jackson, 15 B. J. Lea 418; Howe Mach. Co. vs. Farrington, 82 N. Y. 121; Aetna Life Ins. Co. vs. Mabbett, 18 Wis. 677; San Francisco vs. Staude, 92 Cal. 560; 28 Pac. 778; Roper et al. vs. Sangamon, 91 Ill. 519; Cawley et al. vs. The People. 95 Ill. 249.

Surety to accept him in that relation without investigation of the previous conduct of the cashier.⁵²

(3) Fraud practiced by the principal on the promisor without the knowledge of the creditor will not avoid the contract.⁵³

§16. Consideration.

In Suretyship as in other contracts a consideration is essential.⁵⁴ If the suretyship is concurrent with the principal con-

⁵² Graves vs. Lebanon Nat. Bank, 10 Bush (Ky.) 23.

Contra—Savings Bank vs. Albee, 63 N. H. 152; Lieberman vs. Wilmington First Nat. Bank, 2 Pennewill (Del.) 416; 45 Atl. 901. The creditor is not required to disclose trivial or immaterial defaults of the principal. Bostwick vs. Van Voorhis, 91 N. Y. 353; Baglin vs. Title Guaranty & Surety Co., 166 Fed. 356. Neither is the creditor required to disclose the financial condition of the principal. Smith vs. First Nat. Bank of London, 107 Ky. 267; 53 S. W. 648; Farmers Nat. Bank vs. Braden, 145 Pa. 473; 22 Atl. 1045; First Natl. Bank of Hancock vs. Johnson, 133 Mich. 700; 95 N. W. 975. Neither is the creditor required to disclose facts which the promisor with reasonable diligence might have ascertained for himself. Sherman vs. Harbin, 125 Iowa 174; 100 N. W. 629; Sebald vs. Citizens Deposit Bank, 31 Ky. L. Rep. 1244; 105 S. W. 130.

⁵³ Bigelow vs. Comegys, 5 O. S. 256; Dangler vs. Baker, 35 O. S. 673; Casoni vs. Jerome, 58 N. Y. 315; Western N. Y. Life Ins. Co. vs. Clinton, 66 N. Y. 326; Taylor County vs. King et al., 73 Iowa, 153; 34 N. W. 774; McCormick vs. Bay City, 23 Mich. 457; State vs. Peck, 53 Me. 284; Spencer vs. Handley, 5 Scott N. R. 546; Graves et al. vs. Tucker, 10 Smedes & M. 9; Johnston vs. Patterson, 114 Pa. 398;

6 Atl. 746; Saginaw Medicine Co. vs. Batey, 179 Mich. 651; 146 N. W. 329; Cunini vs. Zambarano, 89 A. 295; 36 R. I. 122; Lovelace vs. Lovelace, 136 Ky. 452; 124 S. W. 400; Atlantic Trust & Deposit Co. vs. Union Trust & Title Corp., 110 Va. 286; 67 S. E. 182.

Contra—Stone vs. Goldberg & Lewis, 6 Ala. App. 249; 60 So. 744; W. T. Raleigh Medical Co. vs. Wilson, 60 So. 1001; 7 Ala. App. 242.

But see Linn County, etc., v. Farris et al., 52 Mo. 75.

The guarantor of a letter of credit who was illiterate and unable to read was induced to sign the paper while intoxicated, the principal falsely representing that the paper was an application for a license under the excise law. The creditor acted upon the letter of credit and shipped the goods without knowledge of the fraud or the other circumstances under which the letter was obtained. Held that the guaranty could be enforced. Page vs. Krekey, 137 N. Y. 307; 33 N. E. 311.

But see Schuylkill County vs. Copley, 67 Pa. St. 386.

⁵⁴ Pfeiffer vs. Kingsland, 25 Mo. 66; Barnes vs. Forbes, 118 N. Y. 580; 23 N. E. 890; Cowels vs. Peck, 55 Conn. 251; 10 Atl. 569; Briggs vs. Latham, 36 Kan. 205; 13 Pac. 129; Chitwood vs. Hatfield, 136 Mo. App. 686; 118 S. W. 1192.

tract, the consideration of the latter will support the former.⁵⁵ There need be no consideration moving directly to the promisor. The consideration may be subsequent to and disconnected with the consideration for the original debt, such as an extension of time or a forbearance to sue⁵⁶ or the payment of money to the promisor as in the case of Surety companies. It is not essential that the consideration be adequate or compensatory,⁵⁷ a nominal consideration, a mere detriment to the creditor will suffice.

A past transaction or executed consideration will not be sufficient to support a suretyship.⁵⁸ The consideration, however, must not be illegal,⁵⁹ nor opposed to public policy.⁶⁰ If the original contract is entered into with an understanding and upon the condition that the suretyship will be executed, the latter, when carried out, will relate back to the original transaction and be supported by the same consideration.⁶¹

⁵⁵ Hughes vs. Littlefield, 18 Me. 400; McNaught vs. McClaughry, 42 N. Y. 24; Bailey vs. Croft, 4 Taunt. 611; Robertson vs. Findley, 31 Mo. 384; Savage vs. Fox, 60 N. H. 17; Bassett vs. O'Neil Coal Co., 140 Ky. 346; 131 S. W. 25; Bower vs. Jones, (S. D.) 128 N. W. 470.

⁵⁶ Parkharst vs. Vail, Admr., 73 Ill. 343; Gay vs. Mott, 43 Ga. 252; Fuller vs. Scott, 8 Kan. 25; Pulliam & Payne vs. Withers, 8 Dana (Ky.) 98; Dahlman vs. Hammel, 45 Wis. 466; Coffin vs. Trustees, 92 Ind. 337; Lee vs. Wisner, 38 Mich. 82; Aultman & Taylor Co. vs. Gorham, 87 Mich. 233; 49 N. W. 486; Breed vs. Hillhouse, 7 Conn. 523; Davies vs. Funston, 45 Upper Can. (Q. B.) 369; Worcester Mechanics Savings Bank vs. Hill, 113 Mass. 25; Bower vs. Jones, 128 N. W. 470; 26 S. D. 414.

Post Sec. 57.

⁵⁷ Lawrence vs. McCalmont et al., 2 How. (U. S.) 426; Davis vs. Wells Fargo & Co., 104 U. S. 159;

Taylor vs. Wightman, 51 Iowa 411; 1 N. W. 607.

⁵⁸ Thomas vs. Williams, 10 Barn. & Cr. 664; Pratt vs. Hedden, 121 Mass. 116; Ludwick vs. Watson, 3 Oreg. 256; Brant vs. Barnett, 10 Ind. App. 653; 38 N. E. 421; Jackson vs. Jackson, 7 Ala. 791; Kissire vs. Plunkett-Jarrell Co., 145 S. W. 567; 103 Ark. 473; Bank of Carrollton vs. Latting, 130 P. 144; 37 Okl. 8.

⁵⁹ Estate of Ramsay vs. Whitbeck, 183 Ill. 550; 56 N. E. 322.

⁶⁰ Rouse vs. Mohr, 29 Ill. App. 321; Board of Education vs. Thompson, 33 O. S. 321; Deobold vs. Oppermann, 111 N. Y. 531; 19 N. E. 94; United States Fidelity & Guaranty Co. vs. Charles, 131 Ala. 658; 31 So. 558.

In Citizens' Trust Co. vs. Tindle, 272 Mo. 681; 199 S. W. 1025, the obligation was held binding on the surety to the extent that the transaction was legal, though it was partially illegal.

⁶¹ Paul vs. Stackhouse, 38 Pa. St. 302; Stanley vs. Miles & Adams, 36 Miss. 434; Williams et al. vs. Perkins, 21 Ark. 18; Ford vs. McLain, 164 Mo. App. 174; 148 S. W. 190; Stroud vs. Thomas, 139 Cal. 274; 72 Pac. 1008.

§17. Suretyship contract must be express.

In the ordinary contracts it often occurs that obligations arise from mere implication, such as when a person orders goods from a merchant, there is an implication that he thereby agrees to pay for them, and he is accordingly so bound. Again such contracts will be implied from the conduct of parties and the surrounding circumstances, without any express terms, verbal or written, such as when one performs services for another who accepts the benefits of such services. This will ordinarily give rise to a contract by inference to pay for the services; but there is no corresponding implication in suretyship, and the engagement must always be express, and the promise will never be enlarged to cover the implications growing out of the language employed.⁶² It does not follow from this that ambiguous words and phrases are not in any case to be given force and effect as obligations in suretyship. To ascertain the meaning of ambiguous words and apply such meaning in the interpreta-

⁶² *The State vs. Medary et al.*, 17 O. 565.

"The bond speaks for itself; and the law is that it shall so speak; and that the liability of sureties is limited to the exact letter of the bond. Sureties stand upon the words of the bond, and if the words will not make them liable, nothing can. There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail."

Bishop vs. Freeman, 42 Mich. 533; 4 N. W. 290; *Ludlow vs. Simond*, 2 Cai. 1; *Vinyard et al. vs. Barnes*, 124 Ill. 346; 16 N. E. 254; *Weir Plow Co. vs. Walmsley*, 110 Ind. 242; 11 N. E. 232; *Noyes vs. Granger*, 51 Iowa 227; 1 N. W. 519; *Henrie vs. Buck*, 39 Kan. 381; 18 Pac. 228; *Nat. Bank vs. Gerke*, 68

Md. 449; 13 Atl. 358; *Shines, Admr., vs. Central Savings Bank*, 70 Mo. 524; *Lee vs. Hastings*, 13 Neb. 508; 14 N. W. 476; *Gunn vs. Geary*, 44 Mich. 615; 7 N. W. 235; *Hutchinson vs. Woodwell*, 107 Pa. St. 509; *Burson vs. Andes and wife*, 83 Va. 445; 8 S. E. 249; *State ex rel. Bell vs. Yates*, 231 Mo. 276; 132 S. W. 672; *Walker vs. State*, 176 Ind. 40; 95 N. E. 353; *Moore vs. Title Guaranty & Trust Co.*, 151 Mo. App. 256; 131 S. W. 477; *American Bonding Co. vs. Pueblo Inv. Co.*, 150 Fed. 17; 80 C. C. A. 97; *Turner vs. Nat. Cotton Oil Co.*, 50 Tex. Civ. App. 468; 109 S. W. 1112; *Trustees Seventh Baptist Church vs. Andrew & Thomas*, 115 Md. 535; 81 Atl. 1; *Phoenix Mfg. Co. vs. Bogardus*, 231 Ill. 528; 83 N. E. 284; *Kuhl vs. Chamberlain*, 140 Iowa 546; 118 N. W. 776; *Daly vs. Old*, 35 Utah, 74; 99 P. 460.

tion of the contract is not creating obligations by implication. "In guaranties, letters of credit, and other obligations of Sureties, the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument, read in the light of surrounding circumstances and the purposes for which it was made. . . . He is not liable on an implied engagement, and his obligation cannot be extended by construction or implication, beyond the precise terms of the instrument by which he has become Surety. But in such instruments the meaning of written language is to be ascertained in the same manner and by the same rules as in other instruments; and when the meaning is ascertained, effect is to be given to it."⁶³ When there is fraud or mistake in the execution of the contract and the actual agreement and intention of the parties is not expressed, the contract may be reformed in equity upon parol proof like other written instruments, and enforced against the Surety and Guarantor.⁶⁴

§18. Ambiguous words — how interpreted.

If the language is ambiguous, and the exact meaning cannot be ascertained, it is the policy of the law to give to the con-

⁶³ Belloni vs. Freeborn, 63 N. Y. 388; Wills vs. Ross et al., 77 Ind. 1.

"The contract of a surety is to be construed as any other contract—that is to say, according to the intent of the parties—and the rules for its construction are not to be confused with the rule that sureties are favorites of the law and have the right to stand upon the strict terms of their obligations." McMullen vs. United States, 167 Fed. 460; 93 C. C. A. 96; Covey vs. Schiesswohl, 50 Colo. 68; 114 Pac. 292; Mystic Workers vs. United States Fidelity and Guaranty Co., 152 Ill. App. 223; Board of Education vs. United States Fidelity and Guar-

anty Co., 155 Mo. App. 109; 134 S. W. 18; Aetna Indemnity Co. vs. Waters, 110 Md. 673; 73 Atl. 712; American Bonding Co. vs. Pueblo Inv. Co., 156 Fed. 17; 80 C. C. A. 97; Hurlburt vs. Kephart, 50 Colo. 353; 115 Pac. 521; Martin vs. Whites, 128 Mo. App. 117; 106 S. W. 608.

⁶⁴ Story on Equity, Sec. 164; Neininger vs. State, 50 O. S. 394; 34 N. E. 633; Wiser vs. Blachly, 1 Johns. Ch. 607; Olmstead vs. Olmstead, 38 Conn. 309; State vs. Frank, 51 Mo. 98; Smith vs. Allen et al., 1 N. J. Eq. 43; Clute vs. Knies, 102 N. Y. 377; 7 N. E. 181; Henkleman vs. Peterson, 154 Ill. 419; 40 N. E. 359.

tract an interpretation which will prevent, if possible, a forfeiture or nullification of the instrument, and two distinct theories of interpretation have been developed which are in hopeless discord. One view is that since letters of Guaranty and contracts of Surety are commercial instruments and generally drawn in brief language, often loose in their structure, that it defeats the intention of the parties and renders such instruments unsafe as mediums of commerce to construe them with nice and technical care and that "It does not lie in the mouth of the Guarantor to say that he may, without peril, scatter ambiguous words, by which another party is misled to his injury,"⁶⁵ and hence the conclusion that ambiguous words with unascertained and doubtful meaning should be construed most strongly against the promisor and impose upon him any obligation consistent with the language employed, if the obligee shall assert and show that he acted upon such construction.⁶⁶ Opposed to this theory is the dictum of Chief Justice Marshall in which he holds "It is the duty of the individual who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume."⁶⁷ This has been the basis of many holdings which adhere to the rule that ambiguous words of suretyship

⁶⁵ Gates vs. McKee, 13 N. Y. 236.

⁶⁶ Mason vs. Pritchard, 12 East. 227; Hargreave vs. Smee, 6 Bing. 244; Rindge vs. Judson, 24 N. Y. 64; City Nat'l Bank vs. Phelps, 86 N. Y. 484; Lawrence vs. McCalmont et al., 2 How. 426; Douglas vs. Reynolds, 7 Peters 122; Drummond vs. Prestman, 12 Wheat. 516; Menard vs. Scudder, 7 La. An. 385; Lee vs. Dick et al., 10 Peters 493; Bright vs. McKnight, 1 Sneed (Tenn.) 158; Taussig et al. vs. Reid et al., 145 Ill. 486; 32 N. E. 918; Sather Banking Co. vs. Briggs Co., 138 Cal. 724; 72 Pac. 352; see also Guaranty

Co. vs. Pressed Brick Co., 191 U. S. 416-425, holding, "If a person deliberately contracts for an uncertain liability he ought not to complain when that uncertainty becomes certain." Town of Whitestown vs. Title Guaranty and Surety Co., 131 N. Y. S. 390; Small Co. vs. Claxton, 1 Ga. App. 83; 57 S. E. 977; Leshner vs. United States Fidelity & Guaranty Co., 239 Ill. 502; 88 N. E. 208; State vs. The Blanchard Construction Co., 91 Kan. 74; Lackland vs. Renshaw, 165 S. W. 314; Shreffler vs. Nadelhoffer, 133 Ill. 536; 25 N. E. 630; 23 Am. St. 626.

⁶⁷ Russell vs. Clark, 7 Cranch 69.

should be given such construction as will impose the least liability consistent with the language used.⁶⁸

§19. Estoppel of promisor to deny recitals in the contract.

A promisor in suretyship will be held strictly to the recitals in his contract and even though the recitals are not true in fact, he is nevertheless estopped from denying them.⁶⁹ This rule does not operate to estop the promisor from denying the validity of the entire contract, or from claiming the acts recited to be void.⁷⁰ Neither will he be estopped from denying recitals which are inserted by fraud,⁷¹ nor will he be estopped from asserting that the transaction was illegal,⁷² but he will be estopped from denying the jurisdiction of the court in actions upon judicial bonds.⁷³

⁶⁸ *Nicholson vs. Paget*, 5 C. & P. 395; *Cutler vs. Ballou*, 136 Mass. 337; *Kay vs. Groves*, 6 Bing. 276; *White vs. Reed*, 15 Conn. 457; *Al-dricks vs. Higgins*, 16 Serg. & R. 212; *Birdsall vs. Heacock*, 32 O. S. 177; *Morgan vs. Boyer*, 39 O. S. 324; *Gard vs. Stevens*, 12 Mich. 292; *American Surety Co. vs. Koen*, 49 Tex. Civ. App. 98; 107 S. W. 938; *Board of Education vs. Fudge*, 4 Ga. App. 637; 62 S. E. 154; *Minor vs. Woodward*, 179 Mo. App. 333; 166 S. W. 855.

⁶⁹ *Bruce vs. U. S.*, 17 How. 437; *Washington Ice Co. vs. Webster*, 125 U. S. 426; 8 S. Ct. 947; *Monteith vs. Commonwealth*, 15 Gratt. 172; *Brockway vs. Petted*, 79 Mich. 620; 45 N. W. 61; *Borden et al. vs. Houston*, 2 Tex. 594; *May vs. May*, 19 Fla. 373; *Cocks vs. Barker*, 49 N. Y. 107; *Harrison vs. Wilkin*, 69 N. Y. 412; *Hundley vs. Filbert*, 73 Mo. 34; *People vs. Huson*, 78 Cal. 154; 20 Pac. 369; *Kelly et al. vs. The State, etc.*, 25 O. S. 567; *Gray vs. The State*, 78 Ind. 68; *White vs. Weatherbee*, 126 Mass. 450; *Williamson vs. Woodman*, 73 Me. 163; *State of Kansas vs. United States Fidelity and Guaranty Co.*, 81 Kan. 660; 106 Pac. 1040; *Indemnity Co.*

vs. Waters, 110 Md. 673; 73 Atl. 712; *Red Wing Sewer Pipe Co. vs. Donnelly*, 102 Minn. 192; 113 N. W. 1.

⁷⁰ *Thomas vs. Burrus*, 23 Miss. 550; *Tinsley vs. Kirby*, 17 S. C. 1; *Tucker et al. vs. State, etc.*, 11 Md. 322.

⁷¹ *Henry vs. Sneed*, 99 Mo. 407; 12 S. W. 663.

⁷² *Daniels et al. vs. Barney*, 22 Ind. 207; *Thorne vs. Travellers Ins. Co.*, 80 Pa. St. 15; *Ley vs. Wise*, 15 La. An. 38; *Leckie vs. Scott* (gambling debt), 5 La. 631.

⁷³ *Carver vs. Carver et al.*, 77 Ind. 498; *Harbaugh et al. vs. Albertson*, 102 Ind. 69; 1 N. E. 298; *Pannills Admr. vs. Calloway*, 78 Va. 387; *Hine vs. Morse*, 218 U. S. 493. Holding, "Having obtained the trust and confidence of the court by aid of the security afforded by the solemn obligation to faithfully execute the order of the court and to pay into court the proceeds of the sale, which he undertook to make, neither the trustee so appointed, nor the surety for his performance of the trust, are in a situation to deny the regularity of the transaction."

Contra—*Crum vs. Wilson*, 61 Miss. 233.

§20. Incompleted contracts of suretyship.

When the contract of suretyship is incomplete, by the omission of words necessary to state the understanding of the parties, or by failure to fill out blanks where printed forms are used, such contracts if they are to be completed at all must either be brought within the ordinary rules of agency, whereby some one acts for the promisor, or must fall within some of the fixed rules of the law operating upon such incomplete writings.

In the absence of these controlling features, an incompleted contract will not be binding since in order to make it speak the truth, a material alteration must take place, which will operate to discharge the promisor,⁷⁴ even though the alteration expresses the real understanding of the parties, and even in cases where the contract in its altered condition is an advantage to the promisor.⁷⁵

If the contract is expressed by a blank indorsement, the generally accepted rule is that it may be completed either by operation of the rules of the law merchant, resulting in certain presumptions, or by the production of extrinsic proof whereby the understanding of the parties is disclosed, and when so completed will be given force and effect.⁷⁶ This position does not impugn the doctrine that written contracts are not to be varied by parol. "There is evidence of a contract of some kind, but its particular terms are not given on the paper but are left to be ascertained by parole."⁷⁷ If the promisor signs an incompleted instrument, and delivers it in that condition he authorizes, by implication, the beneficiary of such instrument to fill in all blanks which by being filled will in no way enlarge or restrict the liability on the undertaking, as, for instance, the

⁷⁴ *Fitzgerald vs. Staples et al.*, 88 Ill. 234; *Thompson vs. Massie*, 41 O. S. 307; *Johnston, Recr. vs. May et al.*, 76 Ind. 293; *Neff vs. Horner*, 63 Pa. St. 327; *Marsh vs. Griffin*, 42 Iowa 403; *Rhea vs. Gibson's Exr.* 10 Gratt. 215; *Wegner vs. The State*, 28 Tex. App. 419; 13

S. W. 608; *U. S. vs. O'Neill*, 19 Fed. Rep. 567.

⁷⁵ *Bethune vs. Dozier*, 10 Ga. 235; *Portage Bank vs. Lane*, 8 O. S. 405; *Anderson vs. Bellenger & Ralls*, 87 Ala. 334; 6 South. 82.

⁷⁶ Ante Sec. 8.

⁷⁷ *Barrows vs. Lane*, 5 Vt. 161.

omission of the sureties' names from the body of a bond.⁷⁸ If, however, the amount of the penalty is left blank the omission cannot be supplied without the express consent of the obligor.⁷⁹ Also the filling in of the date blank in a bail bond fixing the time for the appearance of the accused was held to be an unauthorized act, and that the contract could not be completed in this respect without the express consent of the obligor.⁸⁰ If the promisor signs an instrument in blank, and intrusts it to the principal to complete, and authorizes him to fill in such words as will express the understanding of the parties, the promisor will be bound, even though the contract when completed does not express the understanding of the parties, and enlarges the liability, providing the creditor who accepts has no knowledge of the change.⁸¹

§21. Statutory requirements.

Judicial bonds and bonds of public officers are regulated by statute, and the requirements as to form, penalty, qualification of Sureties and approval are generally stipulated in the statutes.

These provisions, however, are merely directory and for the benefit of the beneficiary of the bonds, and the Sureties will be

⁷⁸ Potter vs. The State, 23 Ind. 550; Neil vs. Morgan et al., 28 Ill. 524; Danker vs. Atwood, 119 Mass. 146; Howell vs. Parsons, 89 N. C. 230; Scheid et al. vs. Leibshultz et al., 51 Ind. 38; McLain vs. Simington, 37 O. S. 484; Partridge vs. Jones, 38 O. S. 375; Building Assn. vs. Cummings, 45 O. S. 664; 16 N. E. 841.

⁷⁹ Austin vs. Richardson, 1 Gratt. 310; Famulener vs. Anderson et al., 15 O. S. 473; Copeland & Brantley vs. Cunningham, 63 Ala. 394; Church vs. Noble, 24 Ill. 291.

Contra—State Lunatic Asylum vs. Douglas, 77 Mo. 647.

⁸⁰ Wegner vs. State, 28 Tex. App. 419; 13 S. W. 608.

⁸¹ Chalaron vs. McFarlane, 9 La. (Curry) 227; McCormick vs. Bay City, 23 Mich. 457; Cawley et al.

vs. The People, 95 Ill. 249; White vs. Duggan, 140 Mass. 18; Green County vs. Wilhite, 29 Mo. App. 459; Stahl vs. Berger, 10 Serg. & Rawle 170; Ex Parte Kerwin, 8 Cow. 118.

As to whether the delivery of a blank suretyship instrument by the promisor raises an implied agency in the principal to fill in any blank, and so bind an innocent creditor, see South Berwick vs. Huntress, 53 Me. 89; State vs. Pepper, 31 Ind. 76.

A party signing a guaranty of the payment of a draft or bill has the right to impose, as a condition to its acceptance and binding force on him, that a certain other person named shall become his co-guarantor, and its acceptance by the payee with notice of the condition will create no liability on such guarantor if the condition is not performed. Belleville Savings Bank vs. Bornman, 124 Ill. 200.

estopped from claiming a non-conformity to statute. If the statute requires the approval of the bond by a public officer, the Surety will not be discharged because the officer neglected his duty in this respect.⁸² Neither will the failure to file the bond within the time prescribed by statute be a defense to the Surety.⁸³ Nor a failure to have the bond signed by the requisite number of Sureties.⁸⁴ Sureties will not be bound, however, in excess of the statutory demand, and when the penalty named is greater than that stipulated in the statute the bond will be held only for the statutory requirement.⁸⁵

§22. Contracts in suretyship executed by agents.

The statutes of frauds in force in this country have generally re-enacted the clause of the English statute which provides that the writing whereby one is charged with the payment of the debt of another may be signed by the party to be so charged or by "some other person thereunto by him lawfully authorized."

The general rule of agency that whatever a person may lawfully do if acting in his own right and in his own name, he may delegate to an agent,⁸⁶ would be sufficient to authorize the execution of a suretyship contract by an agent, but the delegated authority must be strictly followed.⁸⁷ Neither the principal nor the creditor can act as agent of the promisor

⁸² Held vs. Bagwell, 58 Iowa 139; 12 N. W. 226; People vs. Huson, 78 Cal. 154; 20 Pac. 369; Thomas vs. Hinkley, 19 Neb. 324; 27 N. W. 231; McCracken vs. Todd, 1 Kan. 148; Boone County vs. Jones, 54 Iowa 699; 2 N. W. 987; 7 N. W. 155; Mowbray vs. State, 88 Ind. 324. Post Sec. 166.

⁸³ City of Chicago vs. Gage et al., 95 Ill. 593; Kelly et al. vs. The State, 25 O. S. 567. Post Sec. 168.

⁸⁴ The Justices vs. Ennis, 5 Ga. 569; Casey vs. Peebles, 13 Neb. 7; 12 N. W. 840; Mears vs. Commonwealth, 8 Watts (Pa.) 223.

⁸⁵ U. S. vs. Ambrose, 2 Fed. Rep. 552; State of Ohio vs. Findlay, 10 Ohio 51; State vs. Purcell, 31 W. Va. 44; 5 S. E. 301.

Contra—Toles vs. Adey, 84 N. Y. 222; Roberts vs. The State, 34 Kan. 151; 8 Pac. 246; in which it was held that bonds containing a penalty in excess of the statutory requirement are wholly void.

⁸⁶ Story on Agency, Sec. 6.

⁸⁷ Stevenson vs. Hoy, 43 Pa. St. 191; Gates vs. Bell, 3 La. Ann. 62; Bryan vs. Berry, 6 Cal. 394; Stovall vs. Commonwealth, 84 Va. 246; 4 S. E. 379; Dugan vs. Champion Coal Co., 195 Ky. 821; 49 S. W. 958. Where a surety company bond is executed by one claiming to be attorney in fact, the bond must be accompanied by a power of attorney showing authority. Anderson vs. Southern Ry. Co., 9 Ga. App. 199; 70 S. E. 983.

§23a. The execution of the contract.

The name of the promisor in suretyship must be affixed to the agreement, or to some memorandum thereof.⁹⁵

Parties signing upon condition that others sign as principals, or co-sureties, will not be bound unless such condition is complied with, provided the obligee accepts the instrument with notice of such condition,⁹⁶ or with knowledge of facts which put him upon inquiry,⁹⁷ unless such condition is waived by the promisor, either expressly or by conduct amounting to estoppel.⁹⁸

⁹⁵ See Post Chapter II.

⁹⁶ Taylor County vs. King, 73 Ia. 153; 34 N. W. 774; Rhode vs. McLean, 101 Ill. 467; Clark vs. Bryce, 64 Ga. 486; Tidball vs. Halley, 48 Cal. 610; Harris vs. Regester, 70 Md. 109; 16 Atl. 386; Board of Education vs. Robinson, 81 Minn. 305; 84 N. W. 105; Farmers Bank vs. Hunt, 124 N. C. 171; 32 S. E. 546; Columbia Ave. Bank & Trust Co. vs. King, 227 Pa. 308; 76 Atl. 18; Bel-den vs. Hurlbut, 94 Wis. 562; 69 N. W. 357; Lemp Brewing Co. vs. Secor, 21 Okl. 537; 96 Pac. 636; French vs. Hicks, 52 Tex. Civ. App. 427; 114 S. W. 691; Sellers vs. Ter-ritory, 121 P. 228; 32 Okl. 147.

Contra—Surety discharged even though creditor had no knowledge of conditions. Union Pacific Tea Co. vs. Dick, 89 Atl. 204; 87 Conn. 711.

⁹⁷ Crawford vs. Owens, 79 S. C. 59; 60 S. E. 236; Benton Co. Sav. Bank vs. Boddicker, 117 Ia. 407; 90 N. W. 822; Baker Co. vs. Hunt-ington, 46 Ore. 275; 79 Pac. 187; Husak v. Clifford, 179 Ind. 173;

100 N. E. 466; Goodyear Dental Vulcanite Co. vs. Bacon, 151 Mass. 460; 24 N. E. 404; French v. Hicks, 52 Tex. Civ. App. 427; 114 S. W. 691; People vs. Sharp, 133 Mich. 378; 94 N. W. 1074; American Ra-diator Co. vs. American Bonding Co., 72 Neb. 100; 100 N. W. 138; Baker County vs. Huntington, 47 Ore. 275; 83 Pac. 532.

Contra—Where the principal named in the bond would be liable in the absence of the bond for the acts or omissions which constitute the breach in the suit, the failure of the principal to execute the bond will not discharge the surety who has signed it and permitted it to be delivered to the obligee. Empire State Surety Co. vs. Carroll Coun-ty, 194 F. 593; Star Grocer Co. vs. Bradford, 74 S. E. 509; 70 W. Va. 496; Title Guaranty & Surety Co. vs. Schmidt, 213 Fed. 199.

⁹⁸ Middleboro Nat'l. Bank vs. Richards, 55 Neb. 682; 76 N. W. 528; White S. M. Co. vs. Saxon, 121 Ala. 399; 25 So. 784.

The condition of co-suretyship may be satisfied, although the parties sign different instruments, provided they relate to the same liability.⁹⁹

An agreement to become surety does not amount to a contract of suretyship.¹⁰⁰

If all persons named in the body of the instrument do not sign, it is held to be sufficient to put the obligee upon inquiry.

⁹⁹ Snow vs. Brown, 100 Ga. 117; 28 S. E. 77; Rudolf vs. Malone, 104 Wis. 470; 80 N. W. 743.

¹⁰⁰ Vogelsang vs. Taylor (Tex. Civ. App.), 80 S. W. 637; Teasley vs. Ray, 9 Ga. App. 649; 72 S. E. 43. ✓

CHAPTER II.

THE STATUTE OF FRAUDS.

- Sec. 24. The Purpose of the Statute of Frauds.
- Sec. 25. The English Statute.
- Sec. 26. Meaning and Scope of the Word "Agreement."
- Sec. 27. Same Subject Continued. American Decisions.
- Sec. 28. The "Memorandum or Note."
- Sec. 29. Same Subject Continued.
- Sec. 30. The Signature to the Memorandum.
- Sec. 31. "Special Promise"—To whom Made.
- Sec. 32. Same.—Applied to Contracts of Indemnity.
- Sec. 33. Same Subject Continued.
- Sec. 34. Same Subject Continued. American Decisions.
- Sec. 35. All Contracts of Suretyship are Within the Statute of Frauds.
- Sec. 36. Credit Given Wholly to the Promisor.
- Sec. 37. Joint Liability of Promisor and Another.
- Sec. 38. Discharge of Original Debtor.
- Sec. 39. Consideration Beneficial to Promisor. Co-Existing Liability of Another is not Always a Test of Suretyship.
- Sec. 40. Promise to pay Debt of Another out of Property of Debtor in Promisor's Hands.
- Sec. 41. Release of Liens and Securities by Creditor as Basis of Original Promise.
- Sec. 42. Promise to Pay Pre-Existing Liability of Promisor not Within the Statute.
- Sec. 43. Assumption of Vendor's Debt as Part of Purchase Price not Within the Statute.
- Sec. 44. Contract of Del Credere Agent not Within the Statute.
- Sec. 45. Pleading Transactions Within the Statute. Plaintiff's Allegations.
- Sec. 46. Pleading Statute as a Defense.
- Sec. 47. Lex Fori. The Statute of Frauds Remedial.

§24. The purpose of the statute of frauds.

The purpose of the modern legislative enactments of the Statute of Frauds is doubtless more extensive and more practi-

cal than that recited in the original English statute which was there expressed as the "prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." It is not merely to prevent false swearing that such statutes are now considered useful, but the deliberate judgment and experience of men has established the necessity of reducing certain transactions to writing in order to secure justice by excluding the uncertain and defective recollection of witnesses.

It was conceived that important questions relating to land titles, involving agreements to convey or incumber, agreements charging one personally who occupies a trust position, agreements not to be performed for a long time in the future, and agreements to pay the debt of another should not be established by any evidence that might be supplied through perjury, misunderstanding of spoken words or innuendo.*

The practical wisdom of this position is corroborated by the universal acceptance of the English Statute of Frauds in all places where the common law prevails and by the persistent spirit with which the statute has been judicially administered.

It has thus become an axiom of Suretyship that such contracts must always take into account the provisions of the Statute of Frauds and so be reduced to writing.

§25. The English Statute.

The English Statute of Frauds is supposed to have been

* "The general object of the Statute was, to take away the temptation to commit fraud by perjury in important matters, by making it requisite in such cases for the parties to commit the circumstances to writing. The particular object of the fourth clause was to prevent any action being brought in certain cases, unless there was a memorandum in writing. The object of both was, that the ground and foundation of the action should be in writing and should not depend on parol testimony." *Saunders vs. Wakefield*, 4 Barn. & Ald. 595, Holroyd, J.

drafted by Lord Hale¹ although not passed² by the House of Lords until after his death.' That part of the Statute relating to Suretyship reads as follows: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; unless the agreement upon which action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized."³ This has been substantially re-enacted in all the states. The most notable exceptions being the statutes in Alabama, California and Delaware, which provide that the agent who signs his principal's name to an obligation within the statute must be authorized in writing so to do,⁴ and the provision of the Kentucky Statute which provides that an agent cannot bind his principal as a Surety unless his authority is in writing,⁵ while in Nevada and Wyoming no provision appears to be made for the execution by an agent, of the suretyship contract within the statute.⁶

A further variance from the English statute may be noted in that a number of the states have enacted that verbal agreements to pay the debt of another are wholly "void," as distinguished from the English statute which provides merely that

¹ Wain vs. Warlters, 5 East 16; but see Ash vs. Abdy, 3 Swanst. 664, where Lord Nottingham says: "I have reason to know the meaning of this law for it had its first rise from me, who brought the bill into the Lord's House, though it afterwards received some additions and improvements from the Judges and Civilians." It may be doubted whether this was intended as a claim for the authorship of the bill or merely that he introduced it in the House of Lords.

² The exact date of the passage of the act cannot be definitely ascertained, but the bill recites that it goes into effect June 24, 1677.

³ 29 Chas. 11, Chap. 3, Section 4.

The English statute is in force in the District of Columbia. Huntley vs. Huntley, 114 U. S. 394; 5 S. Ct. 884.

No statute has been enacted in Maryland and New Mexico, and the English statute is considered in force as a part of the Common Law. Sibley vs. Williams, 3 Gill. & Johns. (Md.) 62; Childers vs. Talbott, 4 N. M. 168; 16 Pac. Rep. 275.

⁴ Alabama Code, Sec. 2152; California Code, Sec. 2309.

⁵ Kentucky Statutes, Sec. 482.

⁶ Statutes of Nevada, Sec. 2630; Revised Statutes of Wyoming, Sec. 2953.

"No action shall be brought."⁷ The English statute and those that follow it in this respect operate only on the remedy, a verbal contract being entirely valid,⁸ but by reason of the statute not enforceable by action.

§26. Meaning and scope of the word "agreement."

The English statute is loosely constructed, and although its ambiguities are patent, and became the subject of controversy in the very beginning, yet the Statute was almost literally transplanted in many states, thus creating new fields of disputation that might easily have been avoided by a revision.

The Statute reads that no action shall be brought on the "promise" unless the "agreement" or "some memorandum or note thereof" is in writing. It is, therefore, important to

⁷ Alabama Code, Sec. 2152; California Civil Code, Sec. 1624; Colorado Statutes, Sec. 2025; Montana Code, Sec. 223; Michigan Compiled Laws, Sec. 9515; Nebraska Statutes, Chap. 32, Sec. 8; New York Revised Statutes, Part II, Chap. 7; Nevada Statutes, Sec. 2630; North Dakota Civil Code, Sec. 3887; Oregon Annotated Laws, Sec. 785; Utah Laws, Sec. 2467; Washington Gen. Statutes, Sec. 2432; Wisconsin Statutes, Sec. 2307; Wyoming Revised Statutes, Sec. 2953.

⁸ *Stone vs. Dennison*, 13 Pick. 1; *Beal vs. Brown*, 13 Allen 114; *Ryan vs. Tomlinson*, 39 Cal. 639; *Simpson vs. Hall*, 47 Conn. 417.

In New York, the statute expressly provides that contracts named in the statute shall be void. "A contract void by the statute is void for all purposes. It confers no right and creates no obligation as between the parties to it; and no claim can be founded upon it as against third persons." *Andrews, J. Dung vs. Parker*, 52 N. Y. 496.

But see *Crane vs. Powell*, 139 N. Y.

379; 34 N. E. 911, where it is held that verbal contracts within the provisions of the statute may be enforced providing the defendant does not specially plead the statute. In no other state where the Court has so held does the statute read as in New York. In other jurisdictions where failure to plead the statute is held a waiver, it is put upon the ground that the statute does not make the contract void but merely prohibits action being maintained upon it. *Child vs. Pearl*, 43 Vt. 224; *La Du-King Mnfg. Co. vs. La Du*, 36 Minn. 473; 31 N. W. 938; *Lowman vs. Sheets*, 124 Ind. 416; 24 N. E. 351.

Beard vs. Converse, 84 Ill. 515. *Scott, J.* "The general rule, if a party would avail of the Statute of Frauds as a defense, he must plead it; has always been adhered to in this State. The reason for the rule is obvious, for a contract within the Statute of Frauds is not absolutely void, but only voidable, at the election of the party against whom it is sought to be enforced."

know what the word "agreement" means in order to determine what is necessary to be in writing. A promise may be the *result* of an agreement, something which grows out of an agreement. An agreement moreover, etymologically as well as by proper legal construction, seems to contemplate a compact by two or more persons. "An agreement is *aggregatio mentium*, viz. when two or more minds are united in a thing done, or to be done. A mutual assent to do a thing."⁹ It is manifest, therefore, that such a construction might be given the word "agreement" as used in the Statute, which would require the writing not only to express mutuality, but also to set out the entire bargain, including the consideration for the promise. Such was the conclusion reached in *Wain vs. Warlters*¹⁰ decided in 1804, the court holding that "promise" and "agreement" did not each mean the same thing, and that it was not sufficient to satisfy the requirements of the Statute that the unilateral "promise" of the Surety was in writing but that the terms under which he signed, the consideration for his promise, must be in writing. The same question was again elaborately discussed by the Judges of the King's Bench in *Saunders vs. Wakefield*,¹¹ and the holding adhered to and thereafter accepted as the English law¹² until by the Mercantile Law Amendment¹³ in 1856 it became unnecessary to express the consideration in writing.

§27. Same subject continued.— American decisions.

There is no uniformity of holding in this country. In some states the legislature has obviated the difficulty by omitting the word "agreement" altogether¹⁴ from the suretyship clause of the Statute, resulting in such case in the holding that the

⁹ Com. Dig., Tit. Agreement, A, 1.

¹⁰ 5 East 10.

¹¹ 4 Barn. & Ald. 595.

¹² *Jenkins vs. Reynolds*, 3 Brod. & Bing. 14; *Morley vs. Boothby*, 3 Bing. 107; *Hawes vs. Armstrong*, 1 Bing. (N. C.) 761; *Cole vs. Dyer*, 1 Crompt. & Jerv. 461; *James vs.*

Williams, 5 Barn. & Ad. 1109; *Clancy vs. Piggott*, 2 Ad. & Ell. 473; *Raikes vs. Todd*, 8 Ad. & Ell. 846; *Sweet vs. Lee*, 3 Man. & G. 452; *Bainbridge vs. Wade*, 16 Ad. & Ell. N. S. 89.

¹³ 19 & 20 Vict. Chap. 97.

¹⁴ California Civil Code, Sec. 1624.

promise only need be in writing and that the "agreement" or the terms or consideration upon which the promise is based may be shown by parol. Also in quite a number of the states, the Statute has coupled the words promise and agreement in such a way that the courts in those states have apparently no difficulty in holding that the promise alone need be in writing.¹⁵ But the Statute in some states adopts literally the English provision and recites, without the alternative clause, that the "agreement" must be in writing. This puts upon the courts the direct responsibility of determining whether they will adopt the English construction or sustain the more difficult position that notwithstanding the language used in the Statute it is the promise only and not the "agreement" that must be in writing.

In Massachusetts the court held that "agreement" was used in the Statute in a popular and not in a technical legal sense and that the word should be treated as synonymous with promise, and that if the promise is in writing without any recital in the writing of the consideration upon which the promise is founded there is a sufficient compliance with the Statute.¹⁶

¹⁵ The Statute of Frauds in Tennessee reads: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, etc." Sec. 3142, Code of Tennessee; *Taylor vs. Ross*, 3 Yerg. 330; *Campbell vs. Findley*, 3 Humph. 330.

The same form of the statute is the basis of a similar holding in *Virginia*—*Violett vs. Patton*, 5 Cranch (U. S.) 142.

Mississippi—*Wren vs. Pearce*, 4 Smed. & M. 91.

Alabama—*Thompson vs. Hall*, 16 Ala. 204. The Ala. Code now re-

quires that the agreement express the consideration, Sec. 4289.

Kentucky—*Ratliff vs. Trout*, 6 J. J. Marsh. 605.

Florida—*Dorman vs. Bigelow*, 1 Fla. 281.

¹⁶ *Packard vs. Richardson*, 17 Mass. 121 (1821). The statute in Massachusetts now provides: "The consideration of such promise, contract or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith but may be proved by any other legal evidence." It has often happened in the development of our law that a "judicial repeal" of an existing statute has shortly been followed by legislative action whereby the statute is made to conform to the view of the Court. Other

In New York, however, the English holding received the sanction of the courts,¹⁷ but it being somewhat doubtful whether such holding would stand, and the decisions in New York becoming conflicting,¹⁸ the earlier opinions were vindicated by amendment to the Statute requiring the consideration to expressly appear in the writing.¹⁹ But in 1863, the Statute was again amended by restoring the Statute to its original English form and so restoring the original rule, that, although there need be no definite expression of consideration in the writing, yet all the substantial and material requirements of the contract must appear in the writing from which a consideration can at least be implied.²⁰

In Illinois and Indiana,²¹ although the courts followed the English construction and held that the consideration must be expressed in writing, the legislature subsequently repudiated the principle and provided that the consideration may be shown by parol. The conflicting opinions in American courts upon this subject, as indicated by the citations made in this section, have a practical importance in connection with the fact that

States besides Massachusetts have, however, repudiated the doctrine of *Wain vs. Warlters*, without modifying their statute.

Connecticut—*Sage vs. Wilcox*, 6 Conn. 81.

Maine—*Levy vs. Merrill*, 4 Greenl. 180; *Gillighan vs. Boardman*, 29 Me. 79.

Missouri—*Bean vs. Valle*, 2 Mo. 126; *Halsa vs. Halsa*, 8 Mo. 303.

North Carolina—*Miller vs. Irvine*, 1 Dev. & Bat. Law (N. C.) 103; *Ashford vs. Robinson*, 8 Ired. Law, 114.

Ohio—*Reed vs. Evans*, 17 O. 128.

Pennsylvania—*Moore vs. Eisman*, 201 Pa. 190; 50 Atl. 982.

Vermont—*Smith vs. Ide*, 3 Vt. 290; *Patchin vs. Swift*, 21 Vt. 292.

¹⁷ *Sears vs. Brink*, 3 Johns. 210; *Kerr vs. Shaw*, 13 Johns. 236.

¹⁸ *Leonard vs. Vredenhurgh*, 8 Johns. 29.

¹⁹ *Brewster vs. Silence*, 8 N. Y. 207.

²⁰ *Drake vs. Seaman*, 97 N. Y. 234; *Barney vs. Forbes*, 118 N. Y. 580; 23 N. E. 890.

²¹ *Patmor vs. Haggard*, 78 Ill. 607; *Gregory vs. Logan*, 7 Blackf. (Ind.) 112.

The English interpretation that the "agreement" showing the consideration must be in writing has been followed in

New Hampshire—*Neelson vs. Sanborne*, 2 N. H. 413; *Underwood vs. Campbell*, 14 N. H. 393.

New Jersey—*Laing vs. Lee*, 20 N. J. Law, 337.

Delaware—*Weldin vs. Porter*, 4 Houst. 236.

Maryland—*Hutton vs. Padgett*, 26 Md. 228; *Elliott vs. Giese*, 7 Harr. & J. 457.

Georgia—*Hargroves vs. Cooke*, 15 Ga. 321.

the Statute of Frauds in most jurisdictions affects merely the remedy²² and that the *Lex Fori* will be enforced whatever the interpretation in the state where the contract is made.²³ ✓

§28. The "memorandum or note."

An oral promise to pay the debt of another will be binding providing the promisor or his agent affixes his signature to some written "memorandum or note" of the promise. This memorandum is not necessarily the contract itself. It may be merely preliminary to the contract, and set out the terms upon which the parties finally agree. If the memorandum is in writing the "agreement" may rest in parol, and of course, if the contract or agreement is in writing, there is no necessity for a written memorandum. So that a mere proposal to contract in suretyship which is in writing, will satisfy the Statute of Frauds, even though the contract or agreement finally entered into is verbal; and such verbal contract may be enforced.

It was held that a resolution of a board of directors of a railway company duly signed by the secretary, setting out the terms upon which the railway company proposed to contract, which terms were thereafter verbally accepted and agreed to by the parties to whom they were delivered, brought the transaction within the provisions of the Statute and that the memorandum being in writing, the subsequent agreement, though verbal, could be enforced.²⁴

²² Ante Sec. 25.

²³ Post Sec. 47.

²⁴ *Himrod Furnace Co. vs. The Cleveland & Mahoning Railroad Co.*, 22 O. S. 451.

In *Argus Co. vs. Mayor of Albany*, 55 N. Y. 495, the Common Council passed a resolution which was duly engrossed upon the minutes of its proceedings and signed by the clerk. The resolutions set out terms and conditions for the publication of the proceedings of the Council and thereafter a verbal contract was made for the printing in accordance with the terms of the resolution. The contract by its terms was not to be performed within a year but it was held "Such resolution constitutes a note or memorandum in writing signed by

the party to be charged within the meaning of the Statute of Frauds."

See also *Reuss vs. Picksley*, L. R., 1 Ex. 342; *Stewart vs. Eddowes*, L. R., 9 C. P. 211; *Sanborn vs. Flagler*, 9 Allen 474; *W. U. Tel. Co. vs. C. & P. R. R. Co.*, 86 Ill. 246; *Vindquest vs. Perky*, 16 Neb. 284; 20 N. W. 301; *Howe vs. Watson*, 179 Mass. 30; 60 N. E. 415; *Willis vs. Ellis*, 98 Miss. 197; 53 So. 498; *Friendly vs. Elwert*, 57 Ore. 599; 112 P. 1085.

Contra—*Linn vs. McLean*, 85 Ala. 250; 4 So. 777; *Koch vs. Williams*, 82 Wis. 186; 52 N. W. 257.

So also if the proposal to contract is verbal, but the acceptance is in writing, the contract will be enforceable under the statute. *Troy Fertilizer Co. vs. Logan*, 96 Ala. 619; 12 So. 712.

Again parties agree verbally to exchange pieces of land which they each respectively own, a difference in cash to be paid by one. This party gives his check to the other in part payment and takes a receipt which recites the terms and conditions of the transaction. It was held that such verbal contract was made valid under the Statute by the memorandum in writing as evidenced by the check and receipt.²⁵

The Statute does not require the "memorandum" to be signed by both parties. It has been urged that the Statute does not contemplate the making of an instrument which can not be enforced against the other party, because not signed by him, and which creates merely an optional liability against the one who signs,²⁶ but such a position is not in accord with the very explicit language of the Statute. Furthermore, it is not the "memorandum or note" which constitutes the agreement by which the parties are bound. The unilateral written memorandum being merely the instrument whereby the statute is satisfied, without which the contract cannot be enforced. But if it be true that the memorandum lacks the element of mutuality necessary to a binding compact, the party who asserts a legal right upon such memorandum by bringing action upon it, thereby supplies such deficiency.

§29. Same subject continued.

It is not necessary that the "memorandum or note" should be all upon one paper. Two or more papers taken together may

²⁵ Raubitschek vs. Blank, 80 N. Y. 478.

It is clear that the statute does not require the contract to be in writing if the *evidence* of the contract is in writing; yet the memorandum differs from *mere evidence* in one important respect. It cannot be used unless in existence before the action is brought. Bill vs. Bament, 9 M. & W. 36. Although retroactive effect may be given the memorandum so as to validate a prior oral agreement.

In Bailey vs. Sweeting, 9 C. B. N. S. 843, the original transaction was an oral agreement voidable by the statute: subsequently the promisor agreed by letter to pay the debt and the letter was held sufficient as a memorandum to satisfy the statute.

See also Townsend vs. Hargraves, 118 Mass. 325.

²⁶ Laurenson vs. Butler, 1 Sch. & Lef. 13, per Lord Redesdale. See Justice vs. Lany, 42 N. Y. 495, for a very full discussion of the views expressed by Lord Redesdale.

constitute the "memorandum" and it is sufficient if one of the papers is signed by the party to be charged, providing the one which is signed incorporates by reference the other papers.²⁷

A different question arises where no reference is made in the signed memorandum, and the connection with other unsigned papers must be shown by parol. To construe papers so connected as constituting together the memorandum required by the Statute would introduce all the mischief which the Statute was intended to prevent.²⁸ If, however, each of the papers considered is signed by the party to be charged, it is not necessary that they should specifically refer to each other and if by inspection and comparison, the coincidence of names, dates, amounts, and description of property indicate to a reasonable certainty that such papers are connected with the same transaction, they may be construed together for the purpose of establishing the memorandum required by the Statute.²⁹

The result of the authorities seems to be that the "memorandum or note" need not be in such form as to constitute a

²⁷Morton vs. Dean, 13 Met. 385; Jackson vs. Lowe, 1 Bing. 9; Dobell vs. Hutchinson, 3 Ad. & Ell. 355; Scarlett vs. Stein, 40 Md. 512; Washington Ice Co. vs. Webster, 62 Me. 341; Williams vs. Morris, 95 U. S. 456.

Where an unsigned paper is to be incorporated by reference it is held to be necessary that the unsigned paper be already in existence. In Wood vs. Midgley, 5 De G. M. & G. 41, the reference was to an agreement that was to be prepared and the Court held the paper could not be used as a part of the memorandum.

See also Brodie vs. St. Paul, 1 Ves. Jr. 326.

But see Jenkins vs. Harrison, 66 Ala. 345.

²⁸Salmon Falls Mnfg. Co. vs. Goddard (Dissenting opinion of Curtis, J.) 14 How. (U. S.) 446.

The opinion of the majority of the Court in this case is clearly

against the weight of the authorities of this country and England and is discredited by a more recent case in the same court. See Grafton vs. Cummings, 99 U. S. 100.

Wiley vs. Roberts, 27 Mo. 388; Nichols vs. Johnson, 10 Conn. 192; O'Donnell vs. Leeman, 43 Me. 158; Clark vs. Chamberlin, 112 Mass. 19; Ridgway vs. Ingram, 50 Ind. 145; Schafer vs. Farmers' & Mechanics' Bank, 59 Pa. St. 144; Johnson vs. Buck, 35 N. J. L. 338; Parkhurst vs. Van Cortlandt, 1 Johns. Ch. 274; Patt vs. Gerst, 149 Ala. 287; 42 So. 1001; Mead vs. White, 53 Wash. 638; 102 P. 753; Ballantine vs. Yung Wing, 146 Fed. 621.

²⁹Wilkinson vs. Evans, L. R., 1 C. P. 407; Ide vs. Stanton, 15 Vt. 685; Work vs. Cowhick, 81 Ill. 317; Thayer vs. Luce, 22 O. S. 62; Beckwith vs. Talbot, 95 U. S. 289; Peck vs. Vandemark, 99 N. Y. 29; 1 N. E. 41.

contract, but must amount to written evidence of it, and this evidence is supplied in conformity to the Statute, whenever all the essential elements of the bargain can be deduced from the writing or from any number of writings signed by the party, the meaning of which can be ascertained to a certainty without resorting to oral proof. The Court may construe these writings, but no substantive fact not stated in the writing can be supplied.

§30. The signature to the memorandum.

The Statute requires the memorandum to be signed. It may be signed by initials³⁰ or by the mark of the party.³¹ Even a printed signature is sufficient if affixed by authority, or if there is evidence of its adoption by the party to be charged.³² It is not necessary that the signature be found at the foot of the writing. If the name is placed so as to authenticate the instrument as the act of the party, and is put there by the party himself or his duly authorized agent, it is immaterial whether it appears at the top, at the bottom or in the body of the writing.³³ Where the memorandum is in the form of a telegram, the signature upon the blanks used by the sender is sufficient,³⁴ and the signature may be affixed by an agent constituted without writing,³⁵ or if the agency is wholly unauthorized, a subsequent ratification will validate the signature.

³⁰ *Phillimore vs. Barry*, 1 Camp. 513; *Salmon Falls Mnfg. Co. vs. Goddard*, 14 How. (U. S.) 446; *Sanborn vs. Flagler*, 9 Allen 474.

³¹ *Schneider vs. Norris*, 2 Maul & Sel. 286; *Morris vs. Kniffin*, 37 Barb. 336.

³² *Drury vs. Young*, 58 Md. 546;

The New York statute requires the writing to be "subscribed." This has been interpreted to mean a manual writing of the name, and that a printed signature is not sufficient. *Vielie vs. Osgood*, 8 Barb. 130; *Davis vs. Shields*, 26 Wend. 341.

³³ *Evans vs. Hoare*, L. R. 1 Q. B. 593; *Hawkins vs. Chace*, 19 Pick. 502; *McConnell vs. Brillhart*, 17 Ill. 354; 2 *Smiths Leading Cases*, 249.

³⁴ *Goodwin vs. Francis*, L. R. 5 C. P. 295; *Smith vs. Easton*, 54 Md. 138; *Brewer vs. Horst Lachmund Co.*, 127 Cal. 643; 60 Pac. 418.

³⁵ *Ante* Sec. 22; *Rutenberg vs. Main*, 47 Cal. 213; *Worrall vs. Munn*, 5 N. Y. 229; *Yerby vs. Grigsby*, 9 Leigh 387; *Conaway vs. Sweeney*, 24 W. Va. 643.

Contra — *Bullard vs. Johns*, 50 Ala. 382.

§31. "Special promise"—To whom made.

A promise made *to the debtor* to pay his debt is not within the statute and need not be in writing, although the statute does not in terms state to whom the promise contemplated by it is to be made, yet it is held to apply only to promises made to a person to whom another is answerable.³⁶ When one promises the maker of a note that he will pay it for him, this is not a suretyship contract within the meaning of the statute.

§32. Same—Applied to contracts of indemnity.

The interpretation given by the courts in the citations of the preceding section, as to whom the promise must run, disposes of the somewhat vexed question involved in Contracts of Indemnity.

The latter undertaking is an engagement to make good or save another from a loss upon some obligation which he has or is about to incur to a third party and is not a promise made to one *to whom* another is answerable. In other words, the promise is to the debtor and not to the creditor. There is no apparent difference in principle between a promise to a debtor to pay his obligation and a promise to indemnify him against it.

If the promise is merely to indemnify another upon a liability which he incurs to a third, there is very little, if any, conflict of authority but that it is not within the statute and so need not be in writing.³⁷

The difficulty, if any, arises in those transactions involving

In Alabama the Statute of Frauds requires the authority of the agent to be in writing.

But see *Caperton vs. Gray*, 4 Yerg. (Tenn.) 563, where verbal authority to sign another's name as security for the costs was held insufficient.

³⁶ *Eastwood vs. Kenyon*, 11 Ad. & Ell. 438; *Beaman vs. Russell*, 20 Vt. 205; *Nelson vs. First National Bank*, 48 Ill. 36; *Meyer vs. Hartman*, 72 Ill. 442; *Hargreaves vs. Parsons*, 13 Mees. & Wels. 561; *Crim vs. Fitch*, 53 Ind. 214; *Goetz vs. Foos*, 14 Minn. 265; *Shook vs. Vanmater*, 22 Wis. 532; *Colt vs. Root*, 17 Mass. 229; *Chapin vs. Lapham*, 20 Pick. 467; *Tighe vs. Morrison*, 116 N. Y. 263; 22 N. E. 164; *Hoyle vs. Hoyle*, L. R. 1 Ch. 84; *Enos vs. Anderson*, 40 Colo. 395; 93 P. 475; *Mize vs. Mashburn*, 8 Ga. App. 408; 69 S. E. 316; *Hedden vs. Schueblin*, 126 Mo. App. 478; 104 S. W. 887.

³⁷ *Hull vs. Brown*, 35 Wis. 652; *Green vs. Brookins*, 23 Mich. 48;

Marcy vs. Crawford, 16 Conn. 549; *Mays vs. Joseph*, 34 O. S. 22; *Lerch vs. Gallup*, 67 Cal. 595; 8 Pac. 322; *Ferrell vs. Millican*, 156 S. W. 230; *Partin vs. Prince*, 75 S. E. 1080; 159 N. C. 553.

Where a contract is strictly one of corporate fidelity guaranty insurance, it would seem on principle that the Statute of Frauds is inapplicable to its oral undertaking, though such undertaking is within the letter of the law.

There seems to be little direct adjudication on this subject. In *Com. use of Ledford vs. Hinson*, 143 Ky. 428; 136 S. W. 912; Ann. Cases 1912D, 291; L. R. A. 1917B, 139, the statute was held to apply.

Contra—*Quinn-Shepherdson Co. vs. U. S. F. & G. Co.*, 142 Minn. 428 (1919); 172 N. W. 693.

A contract of indemnity is distinguishable from guaranty and suretyship in that it undertakes to save another from loss on some obligation to a third person and is not a promise to whom another is

a fourth party, and there is some confusion in this class of cases, which apparently results more from the reasoning of some of the decisions, than from any error in the conclusions reached. *Thomas vs. Cook*, decided in 1828, presented the question as to whether a verbal promise to indemnify a second party as Surety upon a bond of a third party, which bond was given by the third party to secure his debt to a fourth party, is an undertaking within the Statute of Frauds. It was held that the promise was not within the Statute of Frauds and need not be in writing, and such is the law of England today. This relation of the parties involves a contingent liability of the third party, the principal debtor, to his Surety, the second party, since if the Surety should pay the debt, his principal must indemnify him, and therefore, in a sense, the first three parties, as between themselves, form a suretyship relation, in which the third party is principal, the second party the creditor, and the first party the promisor; the undertaking of the promisor being that he will pay the second party if the third party does not respond to his implied liability. It may, therefore, be urged with some force that the promisee, the second party, relies upon two separate persons for his protection in this arrangement, who are concurrently liable to him; and this readily gives rise to the suggestion that the undertakings of these two parties are collateral, and hence covered by the statute. Such was the reasoning of *Green vs. Cresswell*, which overruled *Thomas vs. Cook*, but which was, in turn, repudiated by the later cases in England.³⁸

§33. Same subject continued.

The doctrine of *Green vs. Cresswell* would be unassailable, if the major premise upon which the decision rests was sound, namely, that the promisor's undertaking is *collateral* to a con-

answerable. *Hall vs. Equitable Surety Co.*, 126 Ark. 535; 191 S. W. 32. A "guarantor" undertakes by separate, independent agreement that another shall perform a duty to a third person and a "surety" joins with another in agreeing with him that he will perform his duty and all the parties are directly and primarily held for the performance. *Ricketson vs. Lizotte*, 90 Vt. 386; 98 Atl. 801.

See *Posten vs. Clem*, 201 Ala. 529; 78 So. 883; 1 A. L. R. 383 (1918), fully annotated.

³⁸*Thomas vs. Cook*, 8 Barn. & Cres. 728 (1828); overruled by *Green vs. Cresswell* (1839): 10 Ad. & Ell. 453; *Reader vs. Kingham*, 13 C. B. N. S. 344 (1862); *Wildes vs.*

Dudlow (1874), L. R. 19 Eq. 198; overruling *Green vs. Cresswell*.

The determination of this question is dependent on whether the agreement is an original and independent one, or whether collateral to the agreement of another person, whereby the promise is to answer for the debt or default of that other. In the first case it is not within the statute, in the second it is. *Spear vs. Farmers' & Mechan. Bank*, 156 Ill. 555; *Richardson Press vs. Albright*, 224 N. Y. 497. Whether a promise is original or collateral is a question of fact for the jury. *Luck vs. Throop*, 189 Ill. 127.

See also *Posten vs. Clem*, 201 Ala. 529; 78 So. 883; 1 A. L. R. 383, annotated note.

current liability of the third party to the promisee. If such is the relation of the parties, then it necessarily results, as a fundamental proposition, that the promise is within the statute.

The indemnitor, however, does not stand in such relation, since there is no obligation of the third party except as the *result* of a contract induced by the indemnitor's agreement. The implied liability of the third party to his principal had no independent existence at any time, and only became a liability as the legal consequence of a suretyship entered into in reliance upon the indemnity contract.

The statute only contemplates an obligation of the third party which exists independently of any contract between the first two. It does not follow from this that there must be an actual subsisting liability growing out of the principal contract before a collateral contract within the statute can be found, but the principal liability must either now exist, or come into existence in the future, as an independent compact, and not arise as a mere legal incident of the alleged collateral undertaking.

A promise by A to indemnify B if the latter will sell merchandise to C is within the statute, and is easily distinguishable from a promise by A to indemnify B if he will become Surety for C. In the first case, the liability of C to B arises from the contract of sale, and may exist independently of any other contract made by B, although induced by the promise of A.

In the latter case, the liability of C to B arises merely as a legal consequence of a suretyship contract which B makes with the creditor of C, and although induced by the promises of A, as in the first case, yet it does not exist independently of the other contract made by B.

It is not the use of the word indemnity which determines the question; there are contracts of indemnity which are within the statute, and also those which are without the statute, depending whether or not the undertaking is concurrent with some other independent liability for the same debt to the same person.

Such is the basis upon which the English cases now rest

and it is believed upon which the conflicting American decisions are most nearly harmonized.

§34. Same subject continued — American decisions.

A large majority of the American courts now adopt the English rule and hold that a promise of indemnity need not be in writing, even though a co-existing implied liability of another arises as a result of the transaction in indemnity.³⁹

There is really no distinction in principle between the cases in which the promise is to indemnify another upon his sole contract of suretyship, and those cases in which the promisor is also a Surety, but agrees to indemnify his co-surety. For instance, where there is a statutory requirement for two Sureties upon a bail bond or a bond of a public officer, one who is about to sign as Surety promises to indemnify another if he will join him as co-surety, in order to meet the requirements of the statute. There will arise at once by operation of law an implied co-existent liability on the part of the principal to save harmless both of the Sureties, and the promise by the indemnitor is, in a sense, a promise to protect his co-surety, if the principal fails to meet such implied liability, but the situation in this respect is not different from that which arises where the indemnitor is not a co-surety.

In both cases, the implied liability of the principal does not

³⁹ Jones vs. Bacon, 145 N. Y. 446; 40 N. E. 216; Mills vs. Brown, 11 Iowa 314; Lucas vs. Chamberlain, 8 B. Mon. (Ky.) 276; George vs. Hoskins, 30 S. W. Rep. (Ky.) 406; Minick vs. Huff, 41 Neb. 516; 59 N. W. 795; Fidelity & Casualty Co. vs. Lawler, 64 Minn. 144; 66 N. W. 143; Vogel vs. Melms, 31 Wis. 306; Aldrich vs. Ames, 9 Gray 76; Cortelyou vs. Hoagland, 40 N. J. Eq. 1; Garner vs. Hudgins, 46 Mo. 399; Demeritt vs. Bickford, 58 N. H. 523; Jones vs. Shorter, 1 Kelley

(Ga.) 294; Anderson vs. Spence, 72 Ind. 315; Ross vs. Wollenberg, 31 Oreg. 269; 44 Pac. 382; Ressetter vs. Waterman, 151 Ill. 169; 37 N. E. 875.

Contra — Draughan vs. Bunting, 9 Ired. (N. C.) 10; Easter vs. White, 12 O. S. 219; Nugent vs. Wolfe, 111 Pa. St. 471; 4 Atl. 15; Bissig vs. Britton, 59 Mo. 204; May vs. Williams, 61 Miss. 125; Simpson vs. Nance, 1 Spears (S. C.) 4; Hartley vs. Sandford, 66 N. J. L. 627; 50 Atl. 454; 55 L. R. A. 206.

exist as an independent undertaking but is merely a **legal consequence** of another contract.

It is sometimes urged that a promise of indemnity to a co-surety need not be in writing because it is a promise to indemnify against the promisor's own default, and, therefore, binding, irrespective of the suretyship feature with which it is associated.⁴⁰ While this may furnish an additional reason why the promise is not within the statute, it falls short as a distinguishing reason with which to harmonize the conflicting decisions.

If the argument is sound which supports the view that a promise by a stranger to the debt to indemnify a Surety is within the statute, then it also brings within the statute the promise to indemnify a co-surety for the promisor in the latter case, in any event, undertakes to indemnify against his own default *only to the extent of his contributory share of the liability*, but as to the co-sureties' contributory share, the relation of the parties is exactly parallel with the position of the parties where the indemnitor is a stranger to the principal contract.

§35. All contracts of suretyship are within the statute of frauds.

There are no exceptions under the Statute of Frauds. A considerable number of undertakings have been held not to be within the Statute which have points of resemblance to the contract contemplated by the statute. These analogous transactions include those which, although resulting incidentally in the promises to pay another's debt, yet are based upon some

⁴⁰ "A promise by a stranger to the debt, to indemnify a Surety, is prima facie within the statute, because the principal is bound by an implied obligation to do what the promisor agrees to do expressly, and the promise is, therefore, really to answer for the default of the principal. When, however, the promisor is directly or indirectly answerable for the debt independ-

ently of the promise, any engagement which he may make, that it shall be paid, or that the Surety shall not be compelled to pay it, will be regarded as contracted on his own behalf, and not for the debt or default of another in the sense in which the term is used in the statute." 1 Smith's Leading Cases, 8 Am. Ed. 538.

Ferrell vs. Maxwell, 28 O. S. 335.

special benefit to the promisor, or result in a cancellation or extinguishment of the principal's debt, or arise out of a joint liability in which credit is given to both principal and promisor, or where sales are made wholly on the credit of the promisor. These and other contracts of similar character, to be hereafter noticed, fall entirely outside the purpose of the Statute and are not properly classed as exceptions to the rule established by the Statute.

But every collateral undertaking to pay a co-existing debt of another person is within the express provision of the Statute, and must be in writing, whether such undertaking is in the form of the contract of a Surety, Guarantor or Indorser, and the fact that the liability of the promisor is co-extensive with the principal, and "original" in the sense that he is bound from the beginning, such as a Surety upon a note, does not take the transaction out of the Statute.

§36. Credit given wholly to promisor.

If A requests another to ship goods to B or perform service for B and charge to himself, and if the goods are shipped or the service performed upon the credit of A, it is not a suretyship contract and need not be in writing, because the necessary element of a co-existing liability of another being wanting there is no suretyship relation.⁴¹ The fact as to whom the credit was given which controls this class of cases is often difficult to determine. The expressions used by the parties, or the circumstances under which the promise was made, may doubtless always be resorted to.⁴²

If the vendor makes a charge in his books against the third party he will generally be estopped from claiming a sale on

⁴¹ *Loomis vs. Newhall*, 15 Pick. 159; *Ueberroth vs. Riegel*, 71 Pa. St. 280; *Simpson vs. Penton*, 2 Cromp. & Mees. 430; *Gleason vs. Briggs*, 28 Vt. 135; *Faires vs. Lodane*, 10 Ala. 50; *Bugbee vs. Kendrick*, 130 Mass. 437; *Phelps vs. Stone*, 172 Mass. 355; 52 N. E. 517; *Gallagher vs. McBride*, 66 N. J. L. 360; 49 Atl. 582; *Lusk vs. Throop*, 189 Ill. 127; 59 N. E. 529; *Smith vs. Miller*, 152 Ala. 485; 44 So. 399; *Cauthron Lumber Co. vs. Hall*, 76 Ark. 1; 88 S. W. 594; *McGowan*

Commercial Co. vs. Midland Coal Co., 41 Mont. 211; 108 P. 655; *Harrison vs. Birrell*, 58 Ore. 410; 115 P. 141; *Atlas Lumber Co. vs. Flint*, 20 S. D. 118; 104 N. W. 1046; *Rubey Trust Co. vs. Weidner*, 174 Mo. App. 692; 161 S. W. 333; *Fitzgerald Spear Co. vs. Kelly*, 81 N. J. L. 6; 83 Atl. 491.

⁴² *Dean vs. Tallman*, 105 Mass. 443; *Cowdin vs. Gottgetreu*, 55 N. Y. 650; *Keate vs. Temple*, 1 B. & P. 158.

the credit of the promisor.⁴³ Even a presentation of the bill to the third party, although charged on the books to the promisor has been held to establish a collateral promise within the statute.⁴⁴ But a charge upon the books to the promisor and the presentation of the bill to him, the property being delivered to the third party, is not of itself conclusive evidence of an independent credit to the promisor,⁴⁵ although such charges in the books would be strong presumptive evidence that the goods were sold wholly on the credit of the promisor.⁴⁶

§37. Joint liability of promisor and another.

If a promisor has put himself in the position of an original purchaser by becoming jointly liable with the principal debtor to whom the goods were delivered, it is the undoubted policy of the statute not to require such contract to be in writing, although the promisor's liability thereby becomes co-existing and co-extensive with that of the principal.

It is not necessary in order to make two persons original promisors that they shall be under equal obligations to pay the debt as between themselves. One may be an accommodation party as to the other and yet be an original debtor as to the creditor.

A sale for the benefit of one on the joint credit of two is an original undertaking of both debtors even though the vendor fully *understands* that as between the debtors themselves, one

⁴³ *Matson vs. Wharam*, 2 T. R. 80. In this case, the form of the promise was "I will see you paid." Such form would generally import an original liability. Yet even this presumption was held to be overcome by the entry in the books against the third party.

Anderson vs. Hayman, 1 H. Bl. 120; *Hardman vs. Bradley*, 85 Ill. 162; *Webb vs. Hawkins Lumber Co.*, 101 Ala. 630; 14 South 407; *Langdon vs. Richardson*, 58 Iowa 610; 12 N. W. 622; *State Bank of Pike vs. People's Nat. Bank*, 118 N. Y. Supp. 641.

Contra—Lance vs. Pearce, 101

Ind. 595; *Larson vs. Jensen*, 53 Mich. 427; 19 N. W. 130; *Cameron vs. Haas Bros. Packing Co.*, 3 Ala. App. 520; *Repair vs. Krebs Lumber Co.*, 80 S. E. 140.

⁴⁴ *Larson vs. Wyman*, 14 Wend. (N. Y.) 246.

Contra—Hormans vs. Lambard, 21 Me. 308.

⁴⁵ *Walker vs. Richards*, 41 N. H. 388; *Noyes vs. Humphreys*, 11 Gratt. (Va.) 636; *McGowan Commercial Co. vs. Midland Coal Co.*, 41 Mont. 211; 108 P. 655; *Shay vs. Cruxton*, 116 N. Y. Supp. 1123; 57 So. 388.

⁴⁶ *Ruggles vs. Gatton*, 50 Ill. 412.

is acting merely to secure credit for the other. In reference to all such cases, the authorities are uniform.⁴⁷

§38. Discharge of original debtor.

A contract by the promisor to pay the debt of another on the condition that the creditor cancel or extinguish the claim against the principal debtor, is not within the statute and need not be in writing. This rests upon the same reason as the cases in which credit is wholly given to the promisor, namely, that the fundamental co-existing liability of another is wanting, without which suretyship does not arise.

If A says to the creditor, "I will pay to you in 30 days B's debt now due, providing you will now execute to him a receipt in full," it raises an original and absolute liability, there being no subsisting principal liability to which it can be collateral.⁴⁸

⁴⁷ *Gibbs vs. Blanchard*, 15 Mich. 292, *Christiancy, J.*: "The statute only applies to such promises made in behalf, or for the benefit of another, as would, if valid, create a distinct and several liability of the party thus promising, and not a joint liability with the party in whose behalf it is made If the promise or the obligation of the two be joint, as between them, on the one side and the promisee on the other, then neither is collateral to the other, and such joint promise is original as to both."

Ex Parte Lane, 1 De Gex 300; *Wainwright vs. Straw*, 15 Vt. 215; *Eddy vs. Davidson*, 42 Vt. 56; *Stone vs. Walker*, 13 Gray 613; *Hetfield vs. Dow*, 27 N. J. L. 440; *Rottman vs. Fix*, 25 Mo. App. 571; *Boyce vs. Murphy*, 91 Ind. 1.

⁴⁸ *Lakeman vs. Mountstephen*, 7 Eng. Ir. App. 17, *Selbourne, J.*: "There can be no suretyship unless there be a principal debtor, who of

course may be constituted in the course of the transaction by matters *Ex Post Facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed." In this case a contractor was asked to perform work for a public board. Payment for this work could be made by public taxation if the board, by resolution, should authorize the work. No such resolution was passed, but the promisor, anticipating such action, verbally agreed to become responsible for the work. The service being performed, the board declined to pay for it or to pass the necessary resolution providing for payment. The case rests upon the point that there never was any principal liability to which the promise was collateral.

Goodman vs. Chase, 1 Barn. &

This rule will not be applied unless there is an absolute discharge of the original debtor. Where one promises to pay if the creditor will allow the principal debtor to remove his property from the state, while the effect of this may be to deprive the creditor of all means of collecting from the debtor, yet the liability still subsists and the promise is within the statute.⁴⁹

So a promise to pay in consideration of a forbearance to sue the debtor, or a dismissal of a pending suit, excludes a novation since the debtor remains liable.⁵⁰

§39. Consideration beneficial to promisor. Co-existing liability of another is not always a test of suretyship.

While every contract of suretyship within the statute requires a co-existing liability of another to which the promisor's liability is collateral, if the object of the promisor's contract is to subserve some pecuniary purpose of his own, even though the obligation of another still subsists, and the performance of the promisor's engagement will finally extinguish the debt of the other, this is not a suretyship contract within the meaning of the statute and need not be in writing.⁵¹ To hold otherwise, would be to interpret the statute as a shield and cover for fraud, and to effectuate rather than to prevent a wrong.

Ald. 297; *Butcher vs. Stuart*, 11 M. & W. 857; *Langdon vs. Hughes*, 107 Mass. 272; *Harris vs. Young*, 40 Ga. 65; *Meriden Britannia Co. vs. Zingsen*, 48 N. Y. 247; *Mulerone vs. American Lumber Co.*, 55 Mich. 622; 22 N. W. 67; *Day vs. Cloe*, 67 Ky. (4 Bush) 563; *Green vs. Solomon*, 80 Mich. 234; 45 N. W. 87; *Whittemore vs. Wentworth*, 76 Me. 20; *Watson vs. Jacobs*, 29 Vt. 169; *Packer vs. Benton*, 35 Conn. 343; *Smith Bros. vs. Miller*, 152 Ala. 485; 44 S. 399; *Daniel Co. vs. Dickey*, 6 So. App. 548; 65 S. E. 301; *Ellis vs. Felt*, 206 Mass. 472; 92 N. E. 702; *Sheppard vs. Newton*, 139 N. C. 533; 52 S. E. 143; *Palmetto Mfg. Co. vs. Parker & Anderson*, 123 Ga. 798; 51 S. E. 714.

⁴⁹ *Murto vs. McKnight*, 28 Ill. App. 238.

⁵⁰ *Ellison vs. Wisheart*, 29 Ind. 32; *Duffy vs. Wunsch*, 42 N. Y. 243.

⁵¹ *Harrison vs. Sawtel*, 10 Johns. 242; *Garner vs. Hudgins*, 46 Mo.

1886; *Mallory vs. Gillett*, 21 N. Y. 412; *Ames vs. Foster*, 106 Mass. 400; *Prime vs. Koehler*, 77 N. Y. 91; *Davis vs. Patrick*, 141 U. S. 479; 12 S. Ct. 58; *Raabe vs. Squier*, 148 N. Y. 81; 42 N. E. 516; *Emerson vs. Slater*, 22 How. (U. S.) 28; *Rhodes vs. Matthews*, 67 Ind. 131; *McCreary vs. Van Hook*, 35 Tex. 631; *Greene vs. Burton*, 59 Vt. 423; 10 Atl. 575; *Muller vs. Riviere*, 59 Tex. 640; *Patton vs. Mills*, 21 Kas. 163; *Wills vs. Cutler*, 61 N. H. 405; *Walnut Co. vs. Courtney*, 96 Ark. 46; 130 S. W. 566; *Johnson vs. Stapleton Co.*, 132 Ga. 164; 63 S. E. 827; *Blakeney vs. Nalle & Co.*, 45 Tex. Civ. App. 635; 101 S. W. 875; *Howell vs. Harvey*, 65 W. Va. 310; 64 S. E. 249; *Mankin vs. Jones*, 68 W. Va. 422; 69 S. E. 981; *Rice vs. Hardwick*, 124 Pac. 800; *Munroe vs. Mundy & Scott*, 146 N. W. 819; *Goodling vs. Simon*, 54 Pa. Sup. Ct. 125; *Davies vs. Carey*, 72 Wash. 537; *Frohardt Bros. vs. Duff*, 135 N. W. 609; 156 Ia. 144.

The statute only applies where the debt of one party is sought to be charged upon another, and it is obvious that a verbal promise to pay for some benefit accruing to the promisor, is none the less lawful because of some incidental benefit to another.

A distinction must be made, however, between a beneficial consideration, which is a mere inducement to enter into the suretyship contract, and a beneficial participation in the main contract. It is the latter only which takes the case out of the statute. The promisor may receive a money consideration for his promise, or may be induced to make the contract for other valuable considerations beneficial to him, yet it will be void if not in writing, but if the performance of the main contract, to which his suretyship is collateral is a benefit to him, a verbal promise in guaranty is sufficient.

The same difference exists in principle between these two phases of guaranty as that which constitutes the difference between the ordinary contract of one to pay his own debt and the collateral contract of suretyship. The contract of one to pay his own debt for goods purchased by himself does not require a written memorandum to prevent fraud. Sufficient protection against perjury is afforded by the fact that the common law requires proof of the consideration to establish the contract, and the consideration being shown the liability will be implied, and this applies with equal force where one is a beneficiary of the main contract, although incidentally in the situation of a promisor in suretyship.

But there is an unguarded opening for fraud where the consideration moving from the creditor does not extend to the promisor. No liability follows against the promisor in such a case by the mere proof of the consideration, but it rests upon proof of the promise itself, and the Statute of Frauds was intended to safeguard this promise from uncertainty.

§40. Promise to pay debt of another out of property of debtor in promisor's hands.

If a debtor has placed property of his own in the possession of the promisor for the express purpose of having it applied to

his debt, a promise by the bailee to so apply it is merely in furtherance of his trust and the Statute of Frauds has no application. The Statute can not be pleaded to justify a breach of trust.⁵² Other situations will, however, frequently arise which can not be disposed of on the basis of the administration of a trust.

(1) Where property has been transferred absolutely to the promisor and in consideration of which he agrees with the debtor to pay his debts and thereafter verbally agrees with the creditor to pay.

(2) Where the promisor has possession of property of the debtor but without any contract in reference to its application, thereafter verbally agrees with the creditor to pay the debt out of this property.

The first undertaking being an absolute obligation to the debtor to pay in consideration of the transfer, the promise to the creditor will be binding though verbal.⁵³ The statute cannot be pleaded to prevent the discharge of the debt by the one who in good conscience ought to pay, and who in the end must pay even if the statute were interposed, for if the promisor can defend against the creditor the latter could pursue his remedies against the principal, and he in turn enforce his contract with the promisor.

In the second case of mere possession of the property of the principal by the promisor, it is generally conceded that the promisor may bind himself verbally to pay the debt of the principal, at least to the extent of the value of the property held by him. This may be said to rest upon the ground that it is merely a promise to pay the creditor what he otherwise would have to

⁵² *Andrews vs. Smith*, 2 C. M. & R. 627; *Hughes vs. Lawson*, 31 Ark. 613; *Ledbetter vs. McGhees*, 84 Ga. 227; 10 S. E. 727; *Bott vs. Barr*, 95 Ind. 243; *Mitts vs. McMorran*, 64 Mich. 664; 31 N. W. 521; *Smith vs. Exchange Bank*, 110 Pa. 508; 1 Atl. 760; *Fehlinger vs. Wood*, 134 Pa. 517; *Hilton vs. Dinsmore*, 21 Me. 410; *Fullam vs. Adams*, 37 Vt.

391; *McKenzie vs. Jackson*, 4 Ala. 230; *Power vs. Rankin*, 114 Ill. 52; 29 N. E. 185; *Plott vs. Foster*, 7 Ala. App. 403; 62 So. 299; *Stein vs. Deutsch*, 178 Ill. App. 615.

⁵³ *Hindman vs. Langford*, 3 Strob. 207; *Meyer vs. Hartman*, 72 Ill. 442; *Carter vs. Zenblin*, 68 Ind. 436; *Justice vs. Tallman*, 86 Pa. 147.

pay the debtor, and having the means to satisfy the promise in his own possession, he cannot be injured by any fraud or perjury in establishing such promise, and so the promise is not within the purpose of the statute.

Such an arrangement is not merely a promise to pay the debt of another but to pay his own debt in a particular way.⁵⁴

§41. Release of liens and securities by creditor as basis of original promise.

A release to the debtor of liens or securities held by the creditor, while furnishing an adequate consideration for a collateral promise of Guaranty or Surety, does not create an original undertaking on the part of the promisor and such promise must be in writing.⁵⁵

If, however, the release of the liens or securities results in some benefit to the promisor, it is not within the Statute, and he may be held upon his verbal engagement even though the principal debtor also remains liable. Thus, where a merchant prom-

⁵⁴ *Dock vs. Boyd*, 93 Pa. 92; *McKenzie vs. Jackson*, 4 Ala. 230; *Wright vs. The State*, 79 Ala. 262; *Woodruff vs. Scaife*, 83 Ala. 152; 3 South. 311; *Hammil vs. Hull*, 4 Colo. App. 290; 35 Pac. 927; *Baldwin Coal Co. vs. Davis*, 62 Pac. Rep. (Col.) 1041; *Davis vs. Banks*, 45 Ga. 138; *C. & W. Coal Co. vs. Liddell*, 69 Ill. 689; *Putney vs. Farnham*, 27 Wis. 187; *Calkins vs. Chandler*, 36 Mich. 320.

See *Richardson vs. Williams*, 49 Me. 558, where it is held that the express assent of the principal must be shown in order to hold the promisor upon his verbal agreement to pay the debt out of a fund in his hands belonging to the principal.

See also *Murphy vs. Renkert*, 59 Tenn. 397; *Birchell vs. Neaster*, 36 O. S. 337.

⁵⁵ *Nelson vs. Boynton*, 3 Met.

396; *Richardson vs. Robbins*, 124 Mass. 105; *Corkins vs. Collins*, 16 Mich. 478; *Cowenhoven vs. Howell*, 36 N. J. L. 323; *Mallory vs. Gillett*, 21 N. Y. 412; *Bunneman vs. Wagner*, 16 Ore. 433; 18 Pac. 841; *Gray vs. Herman*, 75 Wis. 453; 44 N. W. 248; *Bray vs. Parcher*, 80 Wis. 16; 49 N. W. 111.

In *Clark vs. Jones*, 85 Ala. 127; 4 South. 771, an owner of a building upon which a sub-contractor was about to place a lien verbally promised the sub-contractor to pay the amount due him from the principal contractor if he would not file his lien. Held that such promise was voidable under the statute. To the same effect see *Warner vs. Willoughby*, 60 Conn. 468; 22 Atl. 1014; *Hahn vs. Maxwell*, 33 Ill. App. 261; *Vaughn vs. Smith*, 65 Iowa 579; 22 N. W. 684.

ises a warehouseman to pay storage charges upon merchandise which he is about to buy for immediate shipment, providing the warehouseman waives his lien for the charges and permits the shipment to go forward at once, the promise need not be in writing;⁵⁶ or where an execution is placed upon property, a verbal promise made to the creditor, by one who claims to own the property by purchase from the execution debtor, that he will pay the debt if the execution is released, will be binding.⁵⁷

The same result, though based upon a different reason perhaps, is reached where the consideration for the promise is the transfer to the promisor of liens or securities held by the creditor upon the property of the debtor. This amounts to a purchase of the securities and the transaction is none the less binding because the price paid is the assumption of the debt of another.⁵⁸

§42. Promise to pay pre-existing liability of promisor not within the statute.

If the ultimate purpose of the promise is to discharge the obligation for which the promisor is already bound it is not within the statute, even though the concurrent obligation of another for the same debt is thereby extinguished.^{58a}

The substance of the transaction will prevail against the form, and although the promise is to pay if the other does not, it falls outside the statute in case the debt is in fact the debt of the promisor.

This rule is illustrated by the common case of sales in which the vendee gives the note of a third party in payment and verbally guarantees the maker. No good reason can be urged why the debtor should escape his liability merely because his promise

⁵⁶ *Prout vs. Webb*, 87 Ala. 593; 6 South, 190.

⁵⁷ *Williamson vs. Rexroat*, 55 Ill. App. 116.

See also *Luark vs. Malone*, 34 Ind. 444; *Weisel vs. Spence*, 59 Wis. 301; 18 N. W. 165; *Blount vs. Hawkins*, 19 Ala. 100; *Scott vs.*

White, 71 Ill. 287; *Hodgins vs. Heaney*, 15 Minn. 185; *Wills vs. Brown*, 118 Mass. 137.

⁵⁸ *Castling vs. Aubert*, 2 East 325; *Allen vs. Thompson*, 10 N. H. 32; *Humphreys vs. St. Louis, I. M. & S. Ry. Co.*, 37 Fed. Rep. 307.

^{58a} *Clay Lumber Co. vs. Hart's Branch Coal Co.*, 140 N. W. 912; 174 Mich. 613.

was made in such form that when carried out it extinguishes the debt of another.⁵⁹

For the same reason a verbal acceptance is not within the Statute, where the acceptor holds funds of the drawer to meet the bill; for it is merely a promise by the acceptor to discharge his obligation to the drawer by paying his creditor.⁶⁰

An owner of land upon which there are two mortgages executed by some prior owner, verbally promises the second mortgagee to pay off the first mortgage in consideration of the second mortgagee releasing him from personal liability on his debt. The second mortgagee if this arrangement were carried out being advanced to a first lien holder on the land.

Such a promise, though to pay and extinguish a debt created by another, is not within the Statute, since the promisor has already become liable for the first mortgage by reason of his ownership of the land.⁶¹

⁵⁹ *Brown vs. Curtiss*, 2 N. Y. 225; *Cardell vs. McNeil*, 21 N. Y. 336; *Malone vs. Keener*, 44 Pa. 107; *Barker vs. Scudder*, 56 Mo. 272; *Dyer vs. Gibson*, 16 Wis. 580; *Wyman vs. Goodrich*, 26 Wis. 21; *Mobile & Girard R. R. Co. vs. Jones*, 57 Ga. 198; *Bryant vs. Rich*, 104 Mich. 124; 62 N. W. 146.

In *Dows vs. Swett*, 120 Mass. 322, the promise was to guarantee a note which a third party executed direct to the creditor in settlement of the promisor's debt. Such a case seems to involve all the principles upon which the cases rest in which the promisor is the owner of the note and transfers it to the creditor for his own debt with a verbal guarantee. In both cases, the substance of the transaction is to provide for the payment of his own

debt. The Court, however, held this promise to be collateral and within the Statute of Frauds.

⁶⁰ *Grant vs. Shaw*, 16 Mass. 341; *Spaulding vs. Andrews*, 48 Pa. 411; *Nelson vs. First Nat. Bank of Chicago*, 48 Ill. 36; *O'Connell vs. Mt. Holyoke College*, 174 Mass. 511; 55 N. E. 460.

⁶¹ *Teeters vs. Lamborn*, 43 O. S. 144; 1 N. E. 513.

See also *Darst vs. Bates*, 95 Ill. 493; *Besshears vs. Rowe*, 46 Mo. 501; *Bateman vs. Butler*, 124 Ind. 223; 24 N. E. 989; *Fain vs. Turner*, 96 Ky. 634; 29 S. W. 628; *Comstock vs. Norton*, 36 Mich. 277; *Dodge vs. Zimmer*, 110 N. Y. 43; 17 N. E. 399; *Malone vs. Keener*, 44 Pa. 107; *Landis vs. Royer*, 59 Pa. 95; *Dorwin vs. Smith*, 35 Vt. 69; *Murphey vs. Gates*, 81 Wis. 370; 51 N. W. 573.

§43. Assumption of vendor's debt as part of purchase price not within the statute.

The rule that a debtor may not invoke the Statute of Frauds as a protection against his own debts is further illustrated in those transactions in which a purchaser of property agrees with the vendor to assume and pay certain debts of the vendor as a part of the purchase price. This rests not only upon the proposition already considered, that a promise to a debtor to pay his debt is not within the statute,⁶² but also upon the further fact that it is the promisor's own debt which he agrees to pay by extinguishing the debt of another.⁶³ Such verbal promise made to the creditor is valid for the same reason,⁶⁴ and such promise if made only to the debtor is enforceable by the creditor for whose benefit it is made.⁶⁵

§44. Contract of del credere agent not within the statute.

An agent or factor selling goods of his principal on a del credere commission, who undertakes to guarantee that the persons to whom he sells will perform their contract, occupies a position analogous to one who buys goods and offers the note of a third party in payment guaranteeing the maker. In the latter case, the promisor guarantees that the thing which he offers in exchange for his obligation shall be equal in value to what it purports to be. In the del credere contract he guarantees, in consideration of his employment and extra commissions, that

⁶² Ante Sec. 31. *Becker vs. Krank*, 77 N. Y. S. 665; 75 App. Div. 191; affirmed, 176 N. Y. 545; 68 N. E. 1114; *Sargent vs. Johns*, 206 Pa. 386; 55 Atl. 1051; *Gay vs. Schaefer*, 52 Wash. 269; 100 P. 334; *Citizens Bank vs. Douglass*, 161 S. W. 601; *Bone vs. Smith*, 164 S. W. 922; *Bicknell vs. Henry*, 69 Wash. 408; 125 Pac. 156.

⁶³ *Rabbermann vs. Wiskamp*, 54 Ill. 179; *Neagle vs. Kelly*, 146 Ill. 460; 34 N. E. 947; *McCasland vs. Doorley*, 47 Ill. App. 513; *Hodgkins vs. Jackson*, 70 Ky. 342; *Lennox vs. Brower*, 160 Pa. 191; 28 Atl. 839; *Staves Carriage Co. vs. Jones*, 123 Pac. 148; 32 Okl. 713.

⁶⁴ *Todd vs. Tobey*, 29 Me. 219; *Robbins vs. Ayres*, 10 Mo. 538; *First Nat. Bank vs. Chalmers*, 144 N. Y. 432; 39 N. E. 331; *Keyes vs. Allen*, 65 Vt. 667; 27 Atl. 319; *Skinker vs. Armstrong*, 86 Va. 1011; 11 S. E. 977; *Hooper vs. Hooper*, 32 W. Va. 526; 9 S. E. 937; *Green vs. Hadfield*, 89 Wis. 138; 61 N. W. 310.

⁶⁵ *Mason vs. Hall*, 30 Ala. 599; *Sacramento Lumber Co. vs. Wagner*, 67 Cal. 293; 7 Pac. 705; *Boals vs. Nixon*, 26 Ill. App. 517; *Carter vs. Zenblin*, 68 Ind. 436; *Stariha vs. Greenwood*, 28 Minn. 521; 11 N. W. 76; *Wynn vs. Wood*, 97 Pa. 216; *Putney vs. Farnham*, 27 Wis. 187; *Green vs. Richardson*, 4 Colo. 584; *Sabo vs. Nimett*, 178 Ill. App. 459.

the result of his sale shall be of a certain value to his principal.

In both cases the consideration moves from the creditor to the promisor who assumes a liability in furtherance of his own interests and the statute does not apply.⁶⁶

§45. Pleading transactions within the statute — Plaintiff's allegations.

A petition or declaration, upon a contract required by the statute to be in writing, need not aver that such contract is in writing. It is sufficient to set out that a valid agreement was made, and it will be presumed to be in lawful form until the contrary is shown. A compliance with the requirements of the statute is a matter of proof and not of pleading. The statute has not altered the rules of pleading so far as the plaintiff is concerned.⁶⁷

§46. Pleading statute as a defense.

A demurrer to the plaintiff's bill or petition will not raise the question of a non-compliance with the statute except where the plaintiff affirmatively pleads facts which show a verbal contract.⁶⁸ If, however, the plaintiff's pleading shows a non-compliance with the statute, the defense of the statute may be in-

⁶⁶ *Bullowa vs. Orgo*, 57 N. J. Eq. 428; 41 Atl. 494; *Osborne vs. Baker*, 34 Minn. 307; 25 N. W. 606; *Suman vs. Inman*, 6 Mo. App. 384; *Bradley vs. Richardson*, 23 Vt. 720; *Sherwood vs. Stone*, 14 N. Y. 267; *Guggenheim vs. Rosenfield*, 68 Tenn. 533; *Sutton & Co. vs. Grey*, 1 Q. B. 285 [1894].

⁶⁷ *Dexter vs. Ohlander*, 89 Ala. 262; 7 South 115; *Barnard vs. Lloyd*, 85 Cal. 131; 24 Pac. 658; *Hancock vs. Council*, 96 Ga. 778; 22 S. E. 335; *Porter vs. Drennan*, 13 Brad. (Ill. App.) 362; *Speyer vs. Desjardins*, 144 Ill. 641; 32 N. E. 283; *Elliott vs. Jenness*, 111 Mass. 29; *Mallaly vs. Holden*, 123 Mass. 583; *Sharkey vs. McDermott*, 91 Mo. 647; 4 S. W. 107; *Hinchman vs. Runtan*, 31 N. J. L. 496; *Marston vs. Swett*, 66 N. Y. 206; *Headington vs. Neff*, 7 O. 231; *Reinheimer vs. Carter*, 31 O. S. 579; *Shields vs.*

Titus, 46 O. S. 541; 22 N. E. 717; *Ecker vs. Bohn*, 45 Md. 278; *Eusley vs. Hollingsworth*, 170 Ala. 396; 54 S. 95; *Alaska Salmon Co. vs. Standard Box Co.*, 158 Cal. 567; 112 P. 454; *Dennison vs. Barney*, 49 Colo. 442; 113 P. 519; *Delaware Insurance Co. vs. Pennsylvania Fire Insurance Co.*, 126 Ga. 380; 55 S. E. 330; *Hanson vs. Svarnerud*, 18 N. D. 550; 120 N. W. 550; *Matthews vs. Towell* (Tex. Civ. App.), 138 S. W. 169. See note.

Contra (by statute)—*Langford vs. Freeman*, 60 Ind. 46; *Waymire vs. Waymire*, 141 Ind. 164; 40 N. E. 523; *Burden vs. Knight*, 82 Iowa 584; 48 N. W. 985.

⁶⁸ *Strouse vs. Elting*, 110 Ala. 132; 20 South. 123; *Switzer vs. Skiles*, 8 Ill. 529; *Murphy vs. Stell*, 43 Tex. 123.

Contra—*Babcock vs. Meek*, 45 Iowa 137.

terposed by demurrer.⁶⁹ But the Statute of Frauds will not be available as a defense unless pleaded.⁷⁰ This rule will generally be applied, even in cases where the bill or petition shows affirmatively a non-compliance with the statute. If the defendant does not demur or plead the statute he will waive the defense.⁷¹

A request to the court to charge is not a pleading, and the issue of the statute cannot be put into the record in this way,⁷² nor by request for special findings.⁷³ Even though the defendant admits in his answer the making of the contract, he may have the protection of the statute if the defense is pleaded.⁷⁴

⁶⁹ *Randall vs. Howard*, 2 Black (U. S.) 587; *Boyd Tobacco Warehouse Co. vs. Terrill*, 76 Ky. 463; *Howard vs. Brower*, 37 O. S. 402; *Macey vs. Childress*, 2 Tenn. Ch. 438; *Ex parte Banks*, 64 So. 74; 185 Ala. 275.

⁷⁰ *Lyon vs. Crissman*, 22 N. C. 268; *Marston vs. Swett*, 66 N. Y. 206; *Wells vs. Monihan*, 129 N. Y. 161; 29 N. E. 232; *Bless vs. Jenkins*, 129 Mo. 647; 31 S. W. 938; *Graff vs. Foster*, 67 Mo. 512; *Douglas vs. Snow*, 77 Me. 91; *C. & W. Coal Co. vs. Liddell*, 69 Ill. 639; *Osborne vs. Endicott*, 6 Cal. 149; *Wiseman vs. Thompson*, 94 Iowa 607; 63 N. W. 346; *Gynn vs. McCauley*, 32 Ark. 97; but see *Hocker vs. Gentry*, 60 Ky. 463; *Boston Duck Co. vs. Dewey*, 6 Gray 446.

Also *Billingslea vs. Ward*, 33 Md. 48, where it is held that it is not necessary for the defendant to plead the statute if the plaintiff sets up an agreement which would be void if not in writing, and that the plaintiff must establish such contract by written evidence in making his prima facie case.

Under the Ohio code the issue of a non-compliance with the statute may be raised by a general denial of the petition. *Birchell vs. Neaster*, 36 O. S. 331. See also *Leesley*

Bros. vs. Rebori Fruit Co., 162 Mo. App. 195; 144 S. W. 138.

⁷¹ *Battell vs. Matot*, 58 Vt. 271; 5 Atl. 479; *Carpenter vs. Davis*, 72 Ill. 14.

⁷² *Warren vs. Dickson*, 27 Ill. 115; *Brigham vs. Carlisle*, 78 Ala. 243; *Cosand vs. Bunker*, 2 S. D. 294; 50 N. W. 84.

⁷³ *Porter vs. Wormser*, 94 N. Y. 431.

⁷⁴ *Burt vs. Wilson*, 28 Cal. 632; *Hollingshead vs. McKenzie*, 8 Ga. 457; *Taylor vs. Allen*, 40 Minn. 433; 42 N. W. 292; *Thomas vs. Churchill*, 48 Neb. 266; 67 N. W. 182; *Ashmore vs. Evans*, 11 N. J. Eq. 151; *Holler vs. Richards*, 102 N. C. 545; 9 S. E. 460.

It has been urged that the defendant's admission of the contract removes all danger of fraud and perjury, and the purpose and intent of the statute being thus fully complied with, the pleading of the statute is wholly technical and should not prevail. Judge Story suggests further that the answer of the defendant being a writing signed by him is a complete compliance with the statute. (Story on Eq. Jur. Sec. 755.) This view was, however, strongly dissented from in *Winn vs. Albert*, 2 Md. Ch. Dec. 169.

§47. Lex fori — The statute of frauds remedial.

Wherever the language of the statute imposes a limitation merely upon the right to bring an action on verbal contracts within its provisions, the settled rule of England and the great weight of authority in this country is, that in actions on such contracts the law of the forum where the action is brought will prevail over the law of the place where the contract is made, for in such cases the Statute of Frauds raises no question of the *validity* of the contract but it stipulates the kind of evidence necessary to maintain an action upon it.

In the leading English case of *Leroux vs. Brown*⁷⁵ a verbal contract, within the Statute of Frauds, made in France, and valid by the laws of France was sued upon in England, and the decision of that case holding that the action could not be maintained is the established rule of England.⁷⁶

The English rule has been followed with approval by many American courts.⁷⁷

⁷⁵ 12 C. B. 801.

⁷⁶ *Bain vs. Whitehaven*, 3 H. L. Cases 1.

⁷⁷ *Dower vs. Chesebrough*, 36 Conn. 39; *Townsend vs. Hargrave*, 118 Mass. 325; *Emery vs. Burbank*, 163 Mass. 326; 39 N. E. 1026; *Bird vs. Monroe*, 66 Me. 337.

Heaton vs. Eldridge & Higgins, 56 O. S. 101, *Williams, J.*: "This statute, in plain terms, forbids the maintenance of an action in any of the courts of this State, on any agreement which, by its terms, is not to be performed within a year, unless the action is supported by the required written evidence. The evidence by which a contract shall

be proved is no part of the contract itself, but its admission or rejection becomes a part of the proceeding on the trial, where its competency and sufficiency must be determined. When the required evidence is lacking the courts must refuse the enforcement of the contract. And it seems clear, that such a statutory regulation prescribing the mode or measure of proof necessary to maintain an action or defense, pertains to the remedy, and constitutes a part of the procedure of the forum in administering the remedy." *Ballantine vs. Yung Wing*, 146 Fed. 621.

But see *Cochran vs. Ward*, 5 Ind. App. 89; 29 N. E. 795.

CHAPTER III

COMMERCIAL GUARANTIES.

- Sec. 48. Scope of the Subject.
- Sec. 49. Construction of Contracts of Guaranty.
- Sec. 50. Construction of Equivocal or Ambiguous Words.
- Sec. 51. General Guaranty.
- Sec. 52. Special Guaranty.
- Sec. 53. Guarantor for One Principal not Held for Joint Principals.
- Sec. 54. Guarantor for Joint Principals not Held for One.
- Sec. 55. Retrospective Guaranties.
- Sec. 56. Guaranty without Knowledge of Principal Debtor.
- Sec. 57. Consideration.
- Sec. 58. Form of Guaranty.
- Sec. 59. Continuing Guaranties.
- Sec. 60. Same Subject Continued.
- Sec. 61. Absolute Guaranties.
- Sec. 62. Guaranty of Collectibility.
- Sec. 63. Test of Due Diligence.
- Sec. 64. Notice to Guarantor of Acceptance of the Guaranty and Advancements Thereon.
- Sec. 65. Federal Court Rule as to Notice of Acceptance of Guaranty.
- Sec. 66. Rule of the State Courts as to Notice of Acceptance of Guaranty.
- Sec. 67. Notice to Guarantor of Default of Principal.
- Sec. 68. Cases in Which Notice to Guarantor of Default is Necessary.
- Sec. 69. Joint and Several Guaranties.
- Sec. 70. Guaranty Covers Interest.
- Sec. 71. Revocation of Guaranty.

§48. Scope of the subject.

The term Commercial Guaranty is used here to describe those transactions wherein one person agrees with another to indemnify him if he will give credit and faith to a third person.¹

¹ There is no special significance in the use of the word "commercial" in this connection. The contract of guaranty in a mercantile or business transaction is no different than a guaranty against the default of the principal in any other relation, such as a bail bond,

a judicial or official bond, or a guaranty against the negligence or tort of the principal.

The technical contract of the Guarantor is, however, rarely met, if at all, outside of "commercial Guaranties."

The special contract of the Guarantor as distinguished from the Surety and other forms of Suretyship is the subject of this chapter.²

The principal field of this branch of Suretyship is that of sales wherein letters of credit or guaranty constitute the inducement for the owner of merchandise to part with his possession and ownership to another. It also includes transactions whereby credit is obtained for the maker of negotiable paper. This class of mercantile instruments are useful and important mediums of commercial intercourse and a spirit of liberality pervades the law of this subject to the end that these convenient aids of commerce may not, by reason of strict and technical constructions, become obstacles and hindrances to business transactions rather than a benefit.³

Letters of credit are frequently executed without the aid of legal counsel, and the extent to which the Guarantor is bound or the seller protected is many times not easily determined from the language employed.

These contracts also often lack the evidences of deliberation which characterize some other forms of Suretyship, such as bonds or covenants under seal, and are frequently interspersed with signs and trade expressions which can be interpreted only by careful attention to the circumstances under which the transaction arises.

§49. Construction of contracts of guaranty.

It is of the highest importance that such construction be placed upon the common and ordinary instruments of commerce as will enable them to serve the purpose for which they are put

² Ante Sec. 6, "Surety and Guarantor distinguished."

"A guaranty, in its enlarged sense, is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person, who, in the first instance, is liable." 3 Kent Com. 121; *Dole vs. Young*, 24 Pick. 252.

See also *Gridley vs. Capen*, 72 Ill. 11; *Merchants Nat. Bank vs. State Bank*, 93 Iowa 650; 61 N. W. 1065.

³ *Lawrence vs. McCalmont*, 2 How. 426; *Rouss vs. Creglow*, 103 Iowa 60; 72 N. W. 429; *Gurley vs. Frieder*, 51 N. Y. S. 3; 28 App. Div. 500; *Davis vs. Wells Fargo Co.*, 104 U. S. 159; *Tischler vs. Hof-*

heimer Son & Co., 83 Va. 35; 4 S. E. 370; *Fisk & Co. vs. Rickel*, 108 Iowa 370; 79 N. W. 120. "While the contract of a guarantor is not to be extended by implication, yet, as these instruments are of frequent use in the commercial world upon the faith of which extensive credits are given and large advances made, care should be taken to hold the party bound to the full extent of his engagement, as the same may be deduced from the language of the contract, read in the light of the surrounding circumstances."

Delaware County Nat. Bank vs. King, 95 N. Y. S. 954; *Whitall-Tatum Co. vs. Manix*, 113 N. Y. S. 1010

in circulation. The natural and accepted meaning of words will in general be a fair basis of interpretation, yet it may happen that *both* the parties use the words with some special meaning, and in such a case to give the words the force of their general sense would not express the intent of either party. It would be manifestly unfair to permit the Guarantor to defend against his liability by standing upon some interpretation which neither party intended when the contract was entered into, and equally unfair to permit the creditor to impose burdens which were not in the contemplation of either party, although in each case only the usual and ordinary meaning of the words is being urged.

A more rational rule is that the language employed by the parties be interpreted according to its generally accepted meaning, except when it is ascertained that the parties themselves intend some other meaning. This is called a "practical construction" of contracts, and where the language used is unambiguous, has sometimes been considered as an innovation upon the familiar limitations imposed on parol evidence to vary written instruments, and also where such contract is one of guaranty it would seem to be opposed to the elementary principle of Suretyship, which forbids the imposition of any liability by parol. But giving to a contract the same construction which the parties themselves have given it, is establishing the real contract rather than varying it by parol.

Such construction by the parties themselves may be ascertained by their acts and conduct in the performance of the contract as well as by their declarations.

The use of the declarations and conduct of the parties, not recited or referred to in the written instrument, as proper aids to the court in construing such instrument, is not prohibited either by the law of evidence or Suretyship. The law cannot reasonably impose obstacles, under the guise of rules of evidence, to the establishing of facts about which originally there was no dispute or misunderstanding.⁴

⁴ *Thorington vs. Smith*, 8 Wall. 1; *Confederate Note Case*, 19 Wall. 548; *Excelsior Needle Co. vs. Smith*, 61 Conn. 56; 23 Atl. 693; *Swisher vs. Deering*, 204 Ill. 203, 206; 68 N. E. 517; *Rice vs. McCague*, 61

Neb. 861; 86 N. W. 486; *Finnucan vs. Feigenspan*, 81 Conn. 378; 71 Atl. 497; *Newcomb vs. Kloeblen*, 77 N. J. L. 791; 74 Atl. 511; *Booth vs. Irving Nat. Exch. Bank*, 116 Md. 668; 82 Atl. 652; *Third Nat.*

Where the context shows that the words are necessarily used in a special or restricted sense, the mutual intent to so use the words will be presumed,⁵ or parol evidence may be offered to show that the word was intended to be modified by the usage of some particular trade or occupation.⁶

The distinction between the use of parol evidence to establish the meaning of words, and the use of such evidence to add new words and conditions to the contract is self evident. Such construction by the special interpretation of the parties is only admissible, however, in those transactions in which the special

Bank vs. Laidlaw, 86 O. S. 91; 98 N. E. 1015; Macdonald vs. Longbottom, 1 El. & El. 977.

"In these cases the parol testimony is used not only to explain the surrounding circumstances, but also to enable the court to look in upon the mind of the contracting parties and read the written words of their contract in the very sense in which they wrote them." In re Curtis, 64 Conn. 501; 30 Atl. 769; Reissner vs. Oxley, 80 Ind. 580; Reisenleiter vs. Lutherische Kirche, 29 Mo. App. 291; Cavazos vs. Trevino, 6 Wall. 773.

In First Nat. Bank vs. Fiske, 133 Pa. 241; 19 Atl. 554, F. wrote the bank that he was expecting shipment of wool for sale on commission from R., stating, "We will honor his drafts with bill of lading attached." The bank cashed the draft and F. refused to accept same claiming that it was the understanding of the bank and himself that the draft should be for only three-fourths of the selling price, whereas the draft made was for the full amount. Held that the fact of such understanding might be shown.

See also Lee vs. Dick, 10 Pet. 482; Mauran vs. Bulus, 16 Pet. 528; Bell vs. Bruen, 1 How. 169; Cumberland Glass Mfg. Co. vs. Wheaton, 208 Mass. 425; 94 N. E. 803; Punta Gorda Bank vs. State Bank, 52 Fla. 399; 42 So. 846; Finnucan vs. Feigenspan, 81 Conn. 378; 71 Atl. 497; Home Savings Bank vs. Hosie, 119 Mich. 116; 77 N. W. 625; Richardson vs. County of Steuben, 226 N. Y. 13; 122 N. E. 449; First Nat. Bank of Van Wert vs. Houtzer, 96 O. S. 404; 117 N. E. 383.

In Merchants Nat. Bank vs. Cole, 83 O. S. 50; 93 N. E. 465, it was

held that "an unlimited guaranty in the absence of words showing that it was intended to be continuing is equivocal, and the surrounding circumstances may be proven, not to contradict or vary the terms of the writing but to enable the court to put itself in the place of the parties the better to understand the terms employed in the writing and to arrive at the mutual intention of the parties."

Contra—Ins. Co. vs. Doll, 35 Md. 89; Davis vs. Shafer, 50 Fed. Rep. 764; Railroad Co. vs. Trimble, 10 Wall. 367; Michael vs. St. L. M. F. Ins. Co., 17 Mo. App. 23; Chrisman vs. Hodges, 75 Mo. 413; Miller vs. Dunlap, 22 Mo. App. 97; St. Paul & Duluth R. Co. vs. Blackmar, 44 Minn. 514; 47 N. W. 172; Wadsworth vs. Smith, 43 Iowa 439.

Holding that where the language of a written instrument is free from ambiguity a special construction placed upon it by the party who drew it is inadmissible.

⁵ Taylor vs. Smith, 116 N. C. 531; 21 S. E. 202. The contract in this case was between sisters and made provision for ownership of property in the survivor if one should die without a "living heir." The context makes it manifest that the words "living heir" were intended to mean "living issue," as neither could die without a "living heir," as the surviving sister would be such heir. See also Mills Carleton Co. vs. Huberty, 84 O. S. 81; 95 N. E. 383.

⁶ Mallan vs. May, 13 M. & W. 511; Kirby vs. W. St. L. & P. Ry. Co., 109 Ill. 412; Stanley vs. Western Ins. Co., L. R., 3 Ex. 71; Metropolitan Exhibition Co. vs. Ewing, 12 Fed. Rep. 198.

interpretation is shown to have been fully concurred in by both parties.

A different rule applies where only one party acts upon some special interpretation and the other acts upon a different construction, or where the language employed is ambiguous.

While the great object in the construction of all contracts is to effectuate the intention of the parties, yet the intention of one party cannot be set up against the intention of the other.^{6a} In such cases, the generally accepted meaning of the words used must prevail, even though in an extreme case such construction might be contrary to the intention of both parties.

§50. Construction of equivocal or ambiguous words.

If the language of the guaranty is susceptible of two meanings, the same rules of construction should be applied as in any other form of contract.

(a) Ascertain, if possible, the sense in which the parties themselves mutually understood the words, giving effect to such ascertained meaning.

(b) If a mutual understanding of the parties cannot be established by reference to the context, the declarations and conduct of the parties or the surrounding circumstances, the construction placed upon the contract by the promisee and *upon which he acted* should prevail without regard to the understanding of the promisor, providing such construction by the promisee was reasonable.⁷

The very just and salutary maxim of Suretyship that the promisor is a favorite with the law has perhaps been extended in its applications beyond the demands of either equity or justice.

It is highly proper that the promisor be permitted to stand upon the exact letter of his bond, in the sense that no conditions or obligations may be imposed by implication, and that no construction should be made which will hold him liable beyond the express terms of his engagement. To this extent he is often properly favored.^{7a} Where the intent of the parties is clearly

^{6a} Mamerow vs. National Lead Co., 206 Ill. 626; 69 N. E. 424; Newcomb vs. Kloeblen, 77 N. J. L. 791; 74 Atl. 511; Mudge vs. Varner, 146 N. C. 147; 59 S. E. 540.

⁷ Ante Sec. 18.

^{7a} London and S. F. Bank vs. Parrott, 125 Cal. 472; 58 Pac. 462. "When it is said that a guarantor is entitled to stand upon the strict

terms of his guaranty, nothing more is intended than that he is not to be held liable for anything that is not within the express terms of the instrument in which his guaranty is contained: that his liability is not to be extended by implication beyond these limits, or to other subjects, than those expressed in the instrument of guaranty. But for

expressed in the instrument, or has been fully ascertained from the surrounding circumstances, the rule of strict construction applies, and the Guarantor may stand upon the precise terms of his contract. In this the authorities are all agreed.⁸

Beyond this there appears to be no equity in favoring the promisor in Suretyship. It may well be doubted whether a Surety or Guarantor should be permitted to claim the protection of his so called "equity" to prevent a disclosure of the contract which he really intended to make, merely because the language he happened to employ was not the most appropriate to express his real intent, or whether, having used words, susceptible of a double meaning he may claim the same protection against one who in good faith acted upon a construction different from the one intended by the promisor.⁹

the purpose of ascertaining the meaning of the language which he has used, and thus determining the extent of his guaranty, the same rules of construction are to be applied as are applied in the construction of other written instruments. His liability is not to be extended by implication beyond the terms of his guaranty as thus ascertained." See also *Stewart vs. Knight & Jillson Co.*, 166 Ind. 498; 76 N. E. 493.

⁸ *Miller vs. Stewart*, 9 Wheat. 680; *Smith vs. Montgomery*, 3 Tex. 199; *Dustin vs. Hodgen*, 47 Ill. 125; *Markland vs. Kimmel*, 87 Ind. 560; *Staver vs. Locke*, 22 Ore. 519; 30 Pac. 497; *State vs. Medary*, 17 O. 554; *Kepley vs. Carter*, 49 Kan. 72; 30 Pac. 182; *Columbus Sewer Pipe Co. vs. Ganser*, 58 Mich. 385; 25 N. W. 377; *Cushing vs. Cable*, 48 Minn. 3; 50 N. W. 891; *Crane Co. vs. Specht*, 39 Neb. 123; 57 N. W. 1015; *Guardian Trust Co. vs. Peabody*, 107 N. Y. S. 515; *George D. Witt Shoe Co. vs. Peacock*, 150 N. C. 545; 64 S. E. 210; *Manhattan Rolling Mill vs. Dellon*, 113 N. Y. S. 571. See also *Hill Mercantile Co. vs. Rotan Grocerv Co.*, 127 S. W. 1080; *Third Nat. Bank vs. Laidlaw*, 86 O. S. 91; 98 N. E. 1015.

⁹ The mischief resulting from a sustained effort to do "equity" in accordance with fixed rules is illustrated in *Birdsall vs. Heacock* 32 O. S. 177. Here the language of the guaranty was "Please send my son

the lumber he asks for and it will be all right." The son was about to engage in the lumber business and was seeking, by this arrangement between his father and the creditor, to establish a credit which would enable him to buy from time to time as his needs should require. This was known to both creditor and Guarantor and from all the circumstances was the undoubted sense in which the words of the Guaranty are used, and for the purposes of the decision it appears to be conceded that the Guarantor if asked would admit that he intended to guarantee such purchases as his son should make from time to time in the regular course of his business, and that the creditor acted upon such construction.

The principal presented his letter and purchased a small amount of lumber and continued to purchase other and larger amounts from time to time, and the holding is that the Guarantor is liable only for the small amount the principal happened to call for when he presented his letter.

The conclusion of the Court is that "such an instrument should be confined to the immediate transaction, unless the language of the promise is sufficiently broad to show that it was meant to reach beyond the present, and render the guarantor answerable for future credits."

Such holding is consistent with,

"There is a sense, undoubtedly, in which it may be said that these obligations are to be strictly construed; and it is this: That the Surety is not to be held beyond the very precise stipulations of his contract. He is not liable on an implied engagement where a party contracting for his own interests might be, and he has a right to insist upon the exact performance of any condition for which he has stipulated, whether others would consider it material or not. But where the question is as to the meaning of the written language in which he has contracted, there is no difference, and there ought not to be any, between the contract of a surety and that of any other party." ¹⁰

and strictly in line with the dictum of Chief Justice Marshall who held it to be the duty of the vendor not to part with his goods upon the credit of one not the vendee, without ascertaining the exact meaning and extent of the contract which the Guarantor makes (*Russell vs. Clark*, 7 Cranch 90) and this is also in line with other cases adopting the Marshall theory. Ante Sec. 18, and cases there cited.

¹⁰ *Gates vs. McKee*, 13 N. Y. 237.

The view that letters of guaranty where the language is ambiguous will be taken most strongly against the Guarantor has received a wide application both in this country and in England.

Haight vs. Brooks, 10 Ad. & Ell. 309; *Mayer vs. Isaac*, 6 Mees. & Wels. 605; *Martin vs. Wright*, 6 Ad. & Ell. N. S. 917; *Bastow vs. Bennett*, 3 Camp. 220; *Bainbridge vs. Wade*, 16 Ad. & Ell. N. S. 89; *Drummond vs. Prestman*, 12 Wheat. 515; *Hoey vs. Jarman*, 39 N. J. Law 523; *First Nat. Bank of Van Wert vs. Houtzer*, 96 O. S. 404; 117 N. E. 383.

"There is no rule exclusively applicable to instruments of suretyship and requiring them to be in all cases interpreted with stringency

and critical acumen in favor of the Surety and against the creditor, and all ambiguities to be resolved to the advantage of the Promisor, and every liability excluded from the operation of the instrument that can by a restrained and refined construction be deemed outside the agreement. In guaranties, letters of credit, and other obligations of Sureties, the terms used and the language employed are to have a reasonable interpretation, according to the intent of the parties as disclosed by the instrument, read in the light of surrounding circumstances and the purpose for which it was made. If the terms are ambiguous the ambiguity may be explained by reference to the circumstances surrounding the parties, and by such aids as are allowable in other cases; and if an ambiguity still remains, I know of no reason why the same rule which holds in regard to other instruments should not apply; and if the Surety has left anything ambiguous in his expressions, the ambiguity must be taken most strongly against him. This certainly should be the rule to the extent that the creditor has in good

There is, however, no apparent necessity for construing an ambiguous contract of Guaranty *most strongly against* the Guarantor even in cases where the real intent of the parties has not been ascertained. To extend to the promisee the privilege of giving to the words any construction he sees fit, is no better equity than to construe doubtful words most strongly in favor of the Guarantor.

The construction, in any event, should be reasonable, and if the promisee acts upon an unreasonable and extreme interpretation, the requirements of justice and equity are fully satisfied by limiting his recovery to such an amount as is ascertained to be reasonable under all the circumstances. Such appears to be the result of the weight of authority.¹¹

faith acted upon and given credit to the supposed intent of the Surety." *Beloni vs. Freeborn*, 63 N. Y. 387; *Allen, J.; Bridgeport Malleable Iron Co. vs. Iowa Cutlery Works*, 130 Iowa 736; 107 N. W. 937; *Hurley vs. Fidelity & Deposit Co.*, 95 Mo. App. 88; 68 Mo. App. 958; *A. B. Small Co. vs. Claxton*, 1 Ga. App. 83; 57 S. E. 977; *Lamm & Co. vs. Colcord*, 22 Okl. 493; 98 P. 355; *Lean vs. Geagan*, 128 Pac. 792; 20 Cal. App. 260; *Bradshaw vs. Barber*, 125 Minn. 479.

The much quoted words of Judge Story have materially influenced the law of the subject, wherein he states: "If the language used be ambiguous and admits of two fair interpretations, and the guarantee has advanced his money upon the faith of the interpretation most favorable to his rights, that interpretation will prevail in his favor; for it does not lie in the mouth of the Guarantor to say that he may, without peril, scatter ambiguous words, by which the other party is misled to his injury." *Lawrence vs. McCalmont*, 2 How. 450.

In *Bright vs. McKnight*, 1 Sneed (Tenn.) 168, an additional reason in support of this view is urged to the effect that it is always within the power of Guarantors to limit

their obligation by appropriate words requiring notice to them of each advancement, or any other condition they think proper for their own protection and safety.

See Ante Sec. 18, and cases there cited.

¹¹ *Smith vs. Molleson*, 148 N. Y. 241; 42 N. E. 669; *Bennett vs. Draper*, 139 N. Y. 266; 34 N. E. 791; *Davis vs. Wells*, 104 U. S. 159; *Wills vs. Ross*, 77 Ind. 1; *Hall vs. Rand*, 8 Conn. 560; *White vs. Reed*, 15 Conn. 457; *London Bank vs. Parrot*, 58 Pac. Rep. (Cal.) 164; *Peoria Savings Co. vs. Elder*, 165 Ill. 55; 45 N. E. 1083; *Shickle Iron Co. vs. Water Works Co.*, 83 Iowa 396; 49 N. W. 987; *Lowe vs. Beckwith*, 14 B. Mon. (Ky.) 184; *Mussey vs. Rayner*, 22 Pick. 228; *Mathews vs. Phelps*, 61 Mich. 327; 28 N. W. 108; *Shines vs. Central Savings Bank*, 70 Mo. 524; *Simons vs. Steel*, 36 N. H. 73; *Gardner vs. Watson*, 76 Tex. 25; 13 S. W. 39; *Noyes vs. Nichols*, 28 Vt. 159; *Moore vs. Holt*, 10 Gratt. (Va.) 284; *Hooper vs. Hooper*, 81 Md. 155; 31 Atl. 508; *London and S. F. Bank vs. Parrott*, 125 Cal. 472; 58 Pac. 164; *National Bank of Commerce vs. Garn*, 23 O. C. C. 447.

Post Sec. 59.

§51 General guaranty.

An instrument of guaranty addressed to all persons, or to any one whom it may concern, may be enforced by any one to whom it is presented who acts upon it. The law creates a privity of contract between the Promisor and the one who makes advances upon the faith of such a promise. Such an instrument is by the custom of mercantile transactions drawn for the express purpose of being shown to others as an instrument for them to make advances upon, and after this purpose has been accomplished it would be giving legal countenance to the perpetration of a fraud to withhold a remedy against the promisor.¹²

A general guaranty is assignable and may be enforced by the assignee who makes advances relying upon it or the assignee may recover on the guaranty for past advances if the cause of action on such advances be also assigned to him,¹³ and in case of a general guaranty of negotiable paper a transfer of the paper carries with it the benefit of the guaranty without any special assignment of the guaranty.¹⁴ A guaranty of a non-negotiable instrument has been held to pass to the assignee, although the guaranty was not in terms transferred.^{14a}

It is held, a general guaranty of negotiable paper will not, however, be equivalent to an indorsement; while it will be available in favor of any subsequent indorsee of the paper, yet the

¹² Lowry vs. Adams, 22 Vt. 160; Griffin vs. Rembert, 2 Rich. N. S. (S. C.) 410; Manning vs. Mills, 12 Up. Can. (Q. B.) 515; Van Wart vs. Carpenter, 21 Up. Can. (Q. B.) 320; Wheeler vs. Mayfield, 31 Tex. 395; Lonsdale vs. Lafayette Bank, 18 O. 126; Birehead vs. Brown, 5 Hill (N. Y.) 635; Union Bank vs. Coster, 3 N. Y. 203; Tidioute Sav. Bank vs. Libbey, 101 Wis. 193; 77 N. W. 182.

¹³ Everson vs. Gere, 122 N. Y. 290; 25 N. E. 492; Claflin vs. Ostrom, 54 N. Y. 581; Lane vs. Duchac, 73 Wis. 655; 41 N. W. 962; Stearns vs. Bates, 46 Conn. 306; Harbord vs. Cooper, 43 Minn. 466; 45 N. W. 860; First National Bank vs. Taylor, 114 Pac. 529; 38 Utah 516.

¹⁴ Commercial Bank vs. Provident Inst., 59 Kan. 361; 53 Pac. 161; State Nat. Bank vs. Haylen, 14 Neb. 480; 16 N. W. 764; Lemmon vs. Strong, 55 Conn. 448; 22 Atl. 293; Gould vs. Ellery, 39 Barb. 163; Stillman vs. Northrup, 109 N. Y. 473; 17 N. E. 379; Carpenter vs. Longan, 16 Wall. 271; Ellsworth vs. Harmon, 101 Ill. 274; Tidioute Sav. Bank vs. Libbey, 101 Wis. 193; 77 N. W. 182; Codman vs. Vt. & C. R. Co., 16 Blatchf. 165; Partridge vs. Davis, 20 Vt. 499; Louisville, N. A. & C. R. Co. vs. Louisville Trust Co., 174 U. S. 552. But see Edgerly vs. Lawson, 176 Mass. 551; 57 N. E. 1020.

^{14a} Bassett vs. Perkins, 119 N. Y. S. 354; Rogers vs. Harvey, 143 Ky. 88, 136 S. W. 128.

Guarantor as against an indorsee of the paper after maturity has the same defenses as the maker against original payee.¹⁵

§52. Special guaranty.

A Guaranty is special when it is addressed to a particular person, firm or corporation, and when so addressed only the promisee named in the instrument acquires any rights under it.¹⁶

The very strict rules of construction of written instruments which prevent the use of parol proof to vary their recitals will not be relaxed even to correct a mistake in the name of the promisee so as to enable some other person than the one named in the instrument to maintain the action.

One making advances under such special guaranty will not be permitted to show that it was intended for him though by mistake addressed to another.¹⁷

A special guaranty implies a trust and confidence in a particular person and such guaranty is not assignable until a right of action has arisen thereon. The right of action upon a special guaranty when fixed may be assigned to another.¹⁸

A stranger to the contract who makes the advances cannot by thus substituting himself for the real promisee create any legal obligation against the guarantor. There is lacking the necessary privity of contract to bind the promisor.

It is held that a guaranty addressed to two persons cannot be acted upon by one of the two named,¹⁹ and for the same

¹⁵ *Trust Co. vs. National Bank*, 101 U. S. 68; *Tuttle vs. Bartholomew*, 12 Met. 452; *Walton vs. Mascall*, 13 M. & W. 452.

Contra—*Nat. Ex. Bank vs. McElfresh*, 37 S. E. Rep. (W. Va.) 541.

¹⁶ *Taylor vs. Wetmore*, 10 O. 401; *Evansville Nat. Bank vs. Kaufmann*, 93 N. Y. 273; *Johnson vs. Brown*, 51 Ga. 498; *Nat. Bank of Peoria vs. Diefendorf*, 90 Ill. 396; *Mitchell vs. Railton*, 45 Mo. App. 273; *Dry vs. Davy*, 10 Ad. & Ell. 30; *Strange vs. Lee*, 3 East. 484; *Wright vs. Russell*, 2 W. Bl. 934; *Barnett vs. Smith*, 17 Ill. 565; *Barker vs. Parker*, 1 Durn. & E. 287; *Lamm & Co. vs. Coleord*, 22 Okla. 493; 98 Pac. 355; *Black vs. Albery*, 89 Ohio St. 240; 106 N. E. 38.

¹⁷ *Grant vs. Naylor*, 4 Cranch 224; *Taylor vs. McClung's Ex.*, 2 Houst. (Del.) 24.

¹⁸ *Robbins vs. Bingham*, 4 Johns. 476; *Evansville Nat. Bank vs. Kaufmann*, 93 N. Y. 273.

But see *Levy vs. Cohen*, 92 N. Y. S. 1024, where it was held that a contract by M. to build a synagogue being assignable, a guaranty to pay him for the work is a general and not a special guaranty, so that M. may assign it with the contract, and the guarantors be liable to the assignee.

¹⁹ *Smith vs. Montgomery*, 3 Tex. 199; *Penoyer vs. Watson*, 16 Johns. 100; *Friedlander vs. New York Plate Glass Insurance Co.*, 56 N. Y. S.

reasons a guaranty addressed to one will not be held for advancements made by that one and another.

§53. Guarantor for one principal not held for joint principals.

A contract of guaranty to stand good for the default of one person cannot be enforced if the advances are made to the principal named in the instrument jointly with another.

To hold the Guarantor for such substituted parties would not only involve a variance of the original contract, but the risk of the undertaking is thereby materially increased.

The promisor might be willing to become responsible for the acts of one in whom he had confidence and yet not willing to assume obligations for others. The question here involved commonly arises where the principal in the letter of credit associates with himself a partner, and the creditor thereafter makes advances relying on the guaranty.

The guarantor is discharged from liability for the partnership advances.²⁰

§54. Guarantor for joint principals not held for one.

A guarantor of a joint enterprise may stand strictly upon his contract and will not be liable except for advancements made to the principals jointly, who are named in the instrument.

A change in a partnership by the death or retirement of one

583. Defendant guaranteed payment of bills for glass that should be bought by one E. from the partnership F. & G. On dissolution of the partnership of F. & G. the contract of guaranty was assigned to F., one of the partners. F. sold E. glass for which E. never paid. In a suit against the defendant guarantor by F., it was held that dissolution of the firm discharged the defendant from all further liability under the guaranty. See also Schoonover vs. Osborne, 108 Iowa, 453; 79 N. W. 263. In Walsh vs. Baillie, 10 Johns. 180, the guaranty was addressed to A. who did not, however, make the advancements, but directed the customer to B., himself guaranteeing payment to B. Held that A. could not recover from the Guarantor.

Contra—American Credit Indemnity Co. vs. Cassard, 83 Md. 272; 34 Atl. 703.

²⁰ Parham Sew. Mach. Co. vs. Brock, 113 Mass. 194; Bell vs. Norwood, 7 La. 95; Conn. Mutual Life Ins. Co. vs. Scott, 81 Ky. 540; White Sew. Mach. Co. vs. Hines, 61 Mich. 423; 28 N. W. 157; Montefiore vs. Lloyd, 15 J. Scott (N. S.) 203; London Assurance Co. vs. Bold, 6 Ad. & Ell. (N. S.) 514; Lyon vs. Plum, 75 N. J. L. 882; 69 Atl. 209; Coan vs. Patridge, 98 N. Y. S. 570.

In Palmer vs. Bagg, 56 N. Y. 523, the principal after the execution of the contract of guaranty associated with himself a partner with the knowledge of the creditor. Advances were thereafter made to the principal in his individual name and charged to him as sole principal

partner will discharge the guarantor of such firm from all further liability.²¹

The Guarantor will be discharged even though the creditor made the advances without knowledge of the change in the firm.²² The result as to the Guarantor is not affected by the fact that the members of the firm are estopped as to the creditor from claiming a dissolution by reason of their failure to give notice. Such estoppel will not apply as against the Guarantor who can only be held to the strict letter of his contract and as to him the firm is dissolved.

§55. Retrospective guaranties.

Whether or not a guaranty is retrospective or is merely prospective depends entirely upon the form of the contract. It is easily possible to make such contract one or the other or both, but an undertaking of guaranty will not be construed to have a retroactive effect unless it appears by express words or by necessary implication to have clearly been the intention of the parties to embrace past transactions.

It is no defense to a Guarantor whose contract includes past transactions that he had no knowledge of the existence of any past indebtedness or that he had been misled by the representations of the principal as to such past indebtedness. If his contract fairly imports a guaranty of past as well as future advances he will be liable.²³

Words of general import will not be construed as retrospective although susceptible of such meaning. If indefinite expressions are used they will be presumed to refer only to future transactions.²⁴

on the books of the creditor. Although delivered at the place of business of the firm they were not so delivered on the credit of the firm. Held that the Guarantor was liable.

²¹ *Cremer vs. Higginson*, 1 *Mason* 323; *Holland vs. Teed*, 7 *Hare* 50; *Cosgrove Brewing & Malting Co. vs. Starrs*, 5 *Ont.* 189; *Simson vs. Cooke*, 8 *Moore* 588; *Hawkins vs. New Orleans Print. & Pub. Co.*, 29 *La. An.* 134.

²² *Byers vs. Hickman Grain Co.*, 84 *N. W. Rep.* (Iowa) 500.

The same principle is involved in *Manhattan Gas Light Co. vs. Ely*, 39 *Barb.* 174.

²³ *People vs. Lee*, 104 *N. Y.* 442; 10 *N. E.* 84; *Harwood vs. Kiersted*, 20 *Ill.* 367. See also *Barnes vs. Cushing*, 168 *N. Y.* 542.

²⁴ *Morrel vs. Cowan*, L. R. 7 *Ch.* Div. 151; *Weed et al. vs. Chambers*, 40 *Up. Can. (Q. B.)* 1; *Weir Plow Co. vs. Walmsley*, 110 *Ind.* 242; 11 *N. E.* 232; *Manhattan Rolling Mill vs. Delon*, 113 *N. Y. S.* 571; *National Bank of Commerce vs. Rockefeller*, 174 *F.* 22; 98 *C. C. A.* 8.

In *Brooks vs. Baker*, 9 *Daly (N. Y. C. P.)* 398, the guaranty was upon a lease and the language employed was "should any default be made in the payment of said rent"

§56. Guaranty without knowledge of principal debtor.

No privity of contract is necessary between the principal and the guarantor.

A contract of guaranty made with the creditor without the knowledge of the principal will bind the guarantor.²⁵

General contracts of indemnity to merchants against loss from the insolvency of customers, called Guaranty Insurance, are usually without the knowledge of the customer, but if based upon a consideration are valid obligations in Suretyship. Such a relation involves all the equities and conditions of a Suretyship procured by the principal for his own accommodation, and the guarantor may have the same benefit from these equities in the matter of his defense.²⁶

§57. Consideration.

The contract of guaranty will not be binding without a consideration.²⁷ But the consideration may arise from several sources.

The principal or the creditor may pay the guarantor a money consideration for his risk.

If the Suretyship is concurrent with the principal contract the same consideration which supports the principal contract will support the Suretyship.²⁸

A past transaction or executed consideration will not support a contract of guaranty.^{28a}

then the obligation is "To pay any deficiency which may be due." At the time of the execution of the guaranty, the lessee had already entered upon his term and was at that time in arrears for rent. Held that the past due rent was not covered by the guaranty.

²⁵ *Solary vs. Stultz*, 22 Fla. 263; *Hughes vs. Littlefield*, 18 Me. 400.

²⁶ *Peake vs. Dorwin Est.*, 25 Vt. 28.

²⁷ Ante Sec. 16.

²⁸ *Erie Co. Savings Bank vs. Coit*, 104 N. Y. 532; 11 N. E. 54; *Paul vs. Stackhouse*, 38 Pa. 302; *Hippach vs. Makeever*, 166 Ill. 136; 46 N. E. 790; *Hirsch vs. Chicago Carpet Co.*, 82 Ill. App. 234; *Lennox vs. Murphy*, 171 Mass. 370; 50 N. E. 644; *Osborne vs. Lawson*, 26 Mo. App.

549; *Kennedy, etc., Co. vs. S. S. Const. Co.*, 123 Cal. 584; 56 Pac. 457; *Heyman vs. Dooley*, 77 Md. 162; 26 Atl. 117; *Cahill Iron Works vs. Pemberton*, 62 N. Y. S. 944; *Klosterman vs. United Electric Co.*, 101 Md. 29, 60 Atl. 251; *Lomax vs. Witkowsky*, 124 Ill. App. 261; *Lompoc Valley Bank vs. Stephenson*, 104 P. 449; *International Harvester Co. vs. Fleming*, 82 A. 843; 109 Atl. 104.

^{28a} *Lagomarsino vs. Gianini*, 80 Pac. 698; 146 Cal. 545; *Hedden vs. Schneblin*, 104 S. W. 887 (Mo.); 126 Mo. App. 428; *Standard Supply Co. vs. Finch & Person*, 60 S. E. 904; 147 N. C. 106.

Contra—Where the thing was done at the request of the guarantor. *Laing vs. Lowenthal*, 151 Ill. App. 599.

It is not necessary that the guarantor should derive any benefit from either the principal contract or the guaranty. A benefit to the principal debtor is a sufficient consideration.²⁹ Such a consideration is found in an agreement for extension of time of payment or a forbearance to sue.³⁰

Such agreements to forbear must, however, be carried out, otherwise the benefit contracted for fails and the consideration fails.³¹

In England the rule appears to be that an actual forbearance to sue in pursuance of a request from the principal will be sufficient consideration to support the guaranty, although the creditor makes no binding agreement to that effect.³²

Such a rule may be supported perhaps upon the ground of estoppel, since the party has had all the benefits of his proposal he should not escape its burdens. The American courts have not, however, conceded this doctrine and have generally held otherwise.³³ So again an agreement to withdraw a suit will

²⁹ *Brokaw vs. Kelsey*, 20 Ill. 304; *McDougald vs. Argonaut Land, etc., Co.*, 117 Cal. 87; 48 Pac. 1021; *Robertson vs. Findley*, 31 Mo. 384; *Savage vs. Fox*, 60 N. H. 17; *Garland vs. Gaines*, 73 Conn. 662, 49 Atl. 19.

³⁰ *Coffin vs. Trustees*, 92 Ind. 337; *Dahlman vs. Hammel*, 45 Wis. 466; *Lininger vs. Wheat*, 49 Neb. 567; 68 N. W. 941; *Peterson vs. Russell*, 62 Minn. 220; 64 N. W. 555; *Featherstone vs. Hendrick*, 59 Ill. App. 497; *Martin vs. Black*, 20 Ala. 309; *Davies vs. Funston*, 45 Up. Can. (Q. B.) 360; *Lee vs. Wisner*, 38 Mich. 82; *Mudge vs. Varner*, 146 N. C. 147; 59 S. E. 540; *J. H. Queal & Co. vs. Peterson*, 116 N. W. 593; 138 Ia. 514; *Jones vs. Britt*, 168 F. 852; 94 C. C. A. 264.

The agreement to extend the time or the forbearance to sue must be for a definite time, otherwise no special benefit results to the debtor, since the creditor may sue at any time and hence no consideration for the guaranty. It has been held, however, that an extension for a "convenient time" is a sufficient benefit to the debtor to amount to a consideration. *Sadler vs. Hawkes*, 1 Rolle. Abr. 27, pl. 49.

See also *Steadman vs. Guthrie*, 4 Met. (Ky.) 155.

In *Traders' National Bank vs. Parker*, 130 N. Y. 415, the extension was for such time as would be necessary to enable the parties to the agreement to travel to another state and make an investigation into the affairs of the debtor. No definite time was fixed, but the agreement bound the creditor to forbear a reasonable length of time to enable the parties to perform the acts stipulated, and such extension being in fact carried out, the consideration was held good.

See also *Moore vs. McKenney*, 83 Me. 80; 21 Atl. 749; *McMicken vs. Safford*, 197 Ill. 540; 64 N. E. 540. A guaranty of a note in consideration of an extension of time of payment is not invalid because there is no definite time fixed for such extension, where there is an actual forbearance for a reasonable time. See also *Lefkovits vs. First Nat. Bank*, 152 Ala. 521; 44 So. 613 (Ala.); *Standard Supply Co. vs. Finch*, 70 S. E. 745; 154 N. C. 456; *Atlas Shoe Co. vs. Bloom*, 209 Mass. 563; 95 N. E. 952.

³¹ *Cobb vs. Page*, 17 Pa. 469.

³² *Crears vs. Hunter*, 19 Q. B. Div. 341.

³³ *Webbe vs. Romona Oolitic Stone Co.*, 58 Ill. App. 226; *Shupe vs. Gal-*

support a guaranty,³⁴ or a release to the principal of securities held by the creditor.³⁵ It is not necessary that the mutual promise of the principal and creditor out of which the consideration arises shall result in some benefit to the principal. If the creditor changes his position to his detriment it is of itself sufficient consideration to bind the guarantor.

§58. Form of guaranty.

The essential requisite of a contract of guaranty is that the language must amount to a promise. Letters of recommendation or introduction containing advice or opinions in reference to the financial ability or the character of another are not guaranties, and the fact that the one to whom such letters are addressed acts upon the recommendation imposes no obligation upon the writer.^{36a} It is not necessary to use the words "promise" or "guaranty" but words must be used which clearly import a promise. A mere request to the creditor to make advances to the debtor does not imply a promise to guarantee payment,³⁶ nor an expression of an opinion that the debtor is good.³⁷

If, however, the obligations of third persons are accepted in settlement of debt any expression of opinion by the one transferring them upon which the creditor relies, such as the note or bill is "safe" or "good" will amount to a guaranty,³⁸ and where one wrote to a merchant requesting him to sell goods to

braith, 32 Pa. 10; College Park Elec. Belt Line vs. Ide, 15 Tex. Civ. App. 273; 40 S. W. 64; Hoffman vs. Mayand, 93 Fed. 171; 35 C. C. A. 256.

But see Breed vs. Hillhouse, 7 Conn. 523, holding that actual forbearance to sue was prima facie evidence of an agreement by the creditor to forbear.

³⁴ Worcester Savings Bank vs. Hill, 113 Mass. 25.

³⁵ Koenigsberg vs. Lennig, 161 Pa. 171; 28 Atl. 1016; Barney vs. Forbes, 118 N. Y. 580; 23 N. E. 890; Killian vs. Ashley, 24 Ark. 511.

^{36a} Russell vs. Clark, 7 Cranch 69; Crooks vs. Propp, 66 N. Y. S. 753.

³⁶ Bushnell vs. Bishop Hill Colony, 28 Ill. 204; Thomas vs. Wright, 98 N. C. 272; 3 S. E. 487.

But see Miami Co. Nat. Bank vs.

Goldberg, 133 Wis. 175; 113 N. W. 391; National Bank of Commerce vs. Rockefeller, 98 C. C. A. 8; 174 F. 22.

³⁷ Case vs. Luse, 28 Iowa 527; Kimball vs. Royce, 9 Rich. Law (S. C.) 295; Eaton vs. Mayo, 118 Mass. 141; Einstein vs. Marshall, 58 Ala. 153; Baker vs. Trotter, 73 Ala. 277; Switzer vs. Baker, 95 Cal. 539; 30 Pac. 761; Hardy vs. Pool, 41 N. C. 28; Kenneweg Co. vs. Finney, 98 Md. 114; 56 Atl. 482; Hughes vs. Peper Co., 139 N. C. 158; 51 S. E. 793; Fowler National Bank vs. Brown, 19 Ind. App. 433; 49 N. E. 833.

³⁸ Sturges vs. Circleville Bank, 11 O. S. 153; Union Nat. Bank vs. 1st Nat. Bank, 45 O. S. 236; 13 N. E. 884; Goldring vs. Thompson, 58 Fla. 248; 51 So. 46.

another "with assurance that any contract of his will and shall be promptly paid" it was held that the parties will be presumed to have intended a guaranty.³⁹

§59. Continuing guaranties.

All guaranties must be either temporary or continuing. If restricted by their terms to a single transaction or within a fixed limit of time they are temporary. If not so restricted they continue in force until revoked.

The latter class are called continuing guaranties. The question has, however, been much mooted as to whether the absence of express limitations results in a limited or continuing guaranty; whether a general authority, without any words of limitation as to time or amount, to make advances to another on the credit of the promisor, will bind the guarantor for any amount at any time until revoked, or whether he is bound merely for any amount the principal asks for and receives at the time he presents his letter of credit.

To restrict such obligations to a single transaction and construe it as a limited guaranty is to adopt the view that instruments of guaranty should be construed *most strongly* in favor of the guarantor, and to construe the instrument as a continuing guaranty is to adopt the view of the other extreme that the construction should be most strongly against the guarantor.⁴⁰

A letter of guaranty read "If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time." This was held to be a limited guaranty. The Court says: "Every person is supposed to have some regard to his own interest; and it is not reasonable to presume any man of ordinary prudence would become surety for another without limitation as to time or amount, unless he has done so in express terms, or by clear implication."⁴¹

³⁹ Moore vs. Holt, 10 Gratt. (Va.) 284; Seoville Manf. Co. vs. Cassidy, 275 Ill. 463; 114 N. E. 181.

⁴⁰ Ante Sec. 50. See also 39 L. R. A. (N.S.) 724, note, "When is a guaranty a continuing one."

⁴¹ Gard vs. Stevens, 12 Mich. 292.

See also Whitney vs. Groot, 24 Wend. 82; Anderson vs. Blakely, 2 Watts & Serg. (Penn.) 237; Baker vs. Rand, 13 Barb. (N. Y.) 152; Smith vs. State, 10 Wyo. 157; 67 Pac. 977.

In Schwartz vs. Hyman, 107 N. Y. 562; 14 N. E. 447, the guaranty

The remarks of the Court in this case would seem to apply also to the following guaranty: "Please let my daughter have what goods she wants, and I will stand good for the money to settle the bills;" yet the Court construed this to be a continuing guaranty.⁴²

It is held, however, by the weight of authority that when the use of general words of credit creates an ambiguity or uncertainty, resort should be had to the surrounding circumstances to ascertain the meaning. Thus, "I, John Meadows, will be answerable for fifty pounds sterling, that Wm. York, of Stanford, butcher, may buy of John Heffield." In reference to this the Court said: "It is obvious that we cannot decide that question upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guarantee by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guarantee." And the Court held it to be a continuing guaranty.⁴³

reads: "You will be kind enough to send Jacob Posner a full line of samples, of course suitable for spring and summer, at the lowest figures. And I will guarantee the payment of any goods you may sell him." This was held to be a temporary guaranty and covered only one transaction. The court appears to have reasoned itself to this conclusion, however, from the fact that the letter of credit contains references to samples suitable for spring and summer, and hence not intended to cover the later seasons in which goods were ordered, and the case does not, on this account, fully support the general view stated in the text. Knowlton vs. Hersey, 76 Me. 345; Birdsall vs. Heacock, 32 O. S. 177; Morgan vs. Boyer, 39 O. S. 324; Richardson School Fund vs. Dean, 130 Mass. 242; National Bank vs. Garn, 23 O. C. C. 447.

⁴² Wright vs. Griffith, 121 Ind. 478; 23 N. E. 281.

See also Young vs. Brown, 53 Wis. 333; 10 N. W. 394; Bastow vs.

Bennett, 3 Camp. 220; Hargreave vs. Smee, 6 Bing. 244; Mason vs. Pritchard, 12 East. 227; Merle vs. Wells, 2 Camp. 413; Newcomb vs. Kloeblen, 77 N. J. L. 791; 74 Atl. 511.

⁴³ Heffield vs. Meadows, 4 C. P. Div. 595.

See also White's Bank vs. Myles, 73 N. Y. 335. In this case the guaranty read: "Please discount for Mr. Cummer to the extent of \$4,000. He will give you customer's paper as collateral. You can also consider me responsible to the bank for the same." Held to be a continuing guaranty.

Earl, J.: "It is impossible to say with certainty whether it was intended as a guaranty for a single credit to the extent of \$4,000, or as a continuing guaranty to that extent. In such a case a resort may be had to the surrounding circumstances, the nature of the business in which the credit was to be used, the situation and relation of all the parties and their previous dealings,

If a guaranty is a continuing one, unlimited as to the amount and period of time for which the guarantor will be liable, such time and amount must be reasonable under the circumstances of each particular case.^{43a}

§60. Same subject continued.

A continuing guaranty which limits the amount is not exhausted by advancements for the stipulated amount being made and paid for by the principal. A contract to stand good for \$1,000 of credit is a guaranty for any balance within this limit, and not a guaranty limited to such time as the total advancements should equal \$1,000, so that if advancements for \$1,000 are made and settled for the guarantor will be liable for additional advancement, the letter of credit not being revoked.

A letter of credit was held to be continuing and to cover any balance for the amount named which read: "I will be and am responsible for any amount for which A. B. may draw on you for any sum not to exceed \$1,500."⁴⁴

and the negotiations which led to the giving of the letter, to enable the court to ascertain what was meant by the letter. . . . The principle of the admission of this class of evidence is, that the court may be placed in regard to the surrounding circumstances as nearly as possible in the situation of the party whose written language is to be interpreted; the question being, what did the person thus circumstanced mean by the language he has employed? Within this principle all prior conversation between the parties is not excluded. Such conversation may pertain to and explain the surrounding circumstances, may be part of some *res gestae*, or may point out the subject matter of the contract."

See also Mathews vs. Phelps, 61 Mich. 327; 28 N. W. 108; Fennell vs. McGuire, 21 Up. Can. (C. P.) 134; Mussey vs. Rayner, 22 Pick. 223; Wood vs. Priestner, L. R., 2 Ex. 66; Hotchkiss vs. Barnes, 34 Conn. 27; Boehne vs. Murphy, 46 Mo. 57; Whitall-Tatum Co. vs. Manix, 113 N. Y. S. 1010; Merchants Nat. Bank vs. Cole, 83 O. S. 50; 93 N. E. 165; National Bank vs. Thomas, 220 Pa. 360; 69 Atl. 813.

^{43a} Mamerow vs. National Lead Co., 206 Ill. 626; 69 N. E. 504; Lehigh Coal & Iron Co. vs. Scallen, 61 Minn. 63; 63 N. W. 245; A. B. Small Co. vs. Claxton, 1 Ga. App. 83; 57 S. E. 977; Cambria Iron Co. vs. Keynes et al., 56 O. S. 501; 47 N. E. 548.

⁴⁴ Crist vs. Burlingame, 62 Barb. (N. Y.) 351.

See also Rindge vs. Judson, 24 N. Y. 64; Gates vs. McKee, 13 N. Y. 232; Douglass vs. Reynolds, 7 Pet. 113; Crittenden vs. Fiske, 46 Mich. 70; 8 N. W. 714; Frost vs. Standard Metal Co., 215 Ill. 240; 74 N. E. 139; Paskucz vs. Bodner, 75 N. J. L. 1047; 67 Atl. 1040; Malleable Iron Range Co. vs. Pusey, 244 Ill. 184; 91 N. E. 51; Hepringa vs. Ortlepp, 167 Ill. App. 586; Bond vs. John V. Farwell Co., 172 Fed. 58; 96 C. C. A. 546; Grob vs. Gross, 83 N. J. L. 430, 84 A. 1064.

Contra—Boston & Sandwich Glass Co. vs. Moore, 119 Mass. 435; Cutler vs. Ballou, 136 Mass. 337; Nicholson vs. Paget, 1 Cromp. & Mees 48; Kay vs. Groves, 6 Bing. 276; White vs. Reed, 15 Conn. 457; Aldricks vs. Higgins, 16 Serg & Rawle 212; Finnucan vs. Feigenspan, 81 Conn. 378; 71 Atl. 497.

§61. Absolute guaranties.

If the liability of the promisor is fixed by the mere default of the principal it is an absolute guaranty but if the promisor's liability depends upon any other event than the non-performance of the principal it is a conditional guaranty.

Contracts of guaranty endorsed upon promissory notes are the most common forms of absolute guaranty. The time and amount of payment are fixed, and the liability of the guarantor depends upon no other condition than that of non-payment by the maker. If the guaranty is absolute the holder is not required to make demand upon the maker and give notice to the guarantor of the default.⁴⁵

It is not necessary to first pursue and exhaust the principal before proceeding against the guarantor in cases where the guaranty is absolute.⁴⁶

Where credit is extended for a definite amount, and for a definite time, no condition is imposed other than the default of the debtor, and the liability is absolute, whether the transaction is a sale or whether it arises in the course of the negotiation of a bill or note.

A guaranty of a debt upon the consideration of an extension

⁴⁵ Davis vs. Wells, Fargo & Co., 104 U. S. 159; Brown vs. Curtiss, 2 N. Y. 225; Clay vs. Edgerton, 19 O. S. 549; Donley vs. Camp, 22 Ala. 659; Parkman vs. Brewster, 15 Gray 271; Chafoin vs. Rich, 77 Cal. 476; 19 Pac. 882; Tyler vs. Waddingham, 58 Conn. 375; 20 Atl. 335; Gage vs. Mechanics' Nat. Bank, 79 Ill. 62; Roberts vs. Hawkins, 70 Mich. 566; 38 N. W. 575; Klein vs. Kern, 94 Tenn. 34; 28 S. W. 295; Hubbard vs. Haley, 96 Wis. 578; 71 N. W. 1036; Campbell vs. Baker, 46 Pa. 243; Milroy vs. Quinn, 69 Ind. 406; Fegley vs. Jennings, 44 Fla. 203; 32 So. 873; Stewart vs. Knight & Jillson Co., 166 Ind. 498; 76 N. E. 743.

But see Lemmert vs. Guthrie Brothers, 69 Neb. 499; 95 N. W. 1046, where the court held that guarantors of a note were entitled to reasonable notice of default of the maker. Providence Mach. Co. vs. Browning, 68 S. C. 1; 46 S. E. 550; Pleasantville Loan Soc. vs. Moore, 70 N. J. L. 306; 57 Atl. 1034; Booth vs. Irving Nat. Exch. Bank, 116 Md.

668; 82 Atl. 652; Lefkovitz vs. First Nat. Bank of Gadsden, 44 So. 613; 152 Ala. 521.

⁴⁶ Cole vs. Merchants' Bank, 60 Ind. 350; Woodstock Bank vs. Downer, 27 Vt. 539; Roberts vs. Riddle, 79 Pa. 468; Osborne vs. Gullikson, 64 Minn. 218; 66 N. W. 965; Penny vs. Crane Bros. Mfg. Co., 80 Ill. 244; London, etc., Bank vs. Smith, 101 Cal. 415; 35 Pac. 1027; Doyle vs. Nesting, 88 Pac. 862; 37 Col. 522; Loverin & Browne Co. vs. Travis, 115 N. W. 829; 135 Wis. 322.

The earlier cases in some jurisdictions make no distinction between absolute and conditional guaranties, and seem to rest upon the assumption that although the guaranty is absolute, yet the principal must first be exhausted before recourse can be had to the guarantor. Rudy vs. Wolf, 16 Serg. & R. 79; Johnston vs. Chapman, 3 Pen. & W. (Pa.) 18; Farrow vs. Respass, 11 Ired. Law (N. C.) 170; Benton vs. Gibson, 1 Hill. Law (S. C.) 56; Craig vs. Phipps, 23 Miss. 240.

of time to the debtor places the transaction upon the same basis as an absolute guaranty of a note. In either case it is a guaranty of payment at maturity. The guarantor has the means of knowing in advance the exact amount of his contingent liability, and the exact time it will fall due, and no conditions of demand and notice enter into such contract.^{46a}

A contract of guaranty for the payment of the rent and the performance of the lessee's covenants for the full term of the lease, made in consideration of the letting of the premises, is an absolute guaranty and renders the guarantor liable immediately upon the default of the lessee.^{46b}

§62. Guaranty of collectibility.

A guaranty of collectibility is distinguished from an absolute guaranty of payment. The latter imposes a liability to pay if the principal does not, and the former if the principal can not. No liability attaches upon a guaranty of collectibility or solvency until in some way it is made to appear that the principal was not able to pay at maturity. Mere failure to pay the debt at maturity will fix the liability upon the promisor in an absolute guaranty of payment, but it is necessary to show more than mere default of the principal to bind the guarantor of collectibility. Such a promise is conditional, and if the creditor by due diligence might have recovered from the debtor at maturity, or at any other time before bringing his action against the guarantor, then the guarantor is exonerated, for his promise is upon the condition that such diligence will be used.⁴⁷

^{46a} *Murphy vs. Hart*, 122 App. Div. 549; *Tilt-Kenney Shoe Co. vs. Haggarty*, 43 Tex. Civ. App. 335; 114 S. W. 386; *Stewart vs. Sharp County Bank*, 71 Ark. 585; 76 S. W. 1064; *Great Western Printing Co. vs. Belcher*, 127 Mo. App. 133; 104 S. W. 894.

^{46b} *Garland vs. Gaines*, 73 Conn. 662; 49 Atl. 19.

⁴⁷ "The fundamental distinction between a guaranty of payment and one of collection is, that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except un-

der special circumstances) any defense to the guarantor; while in the second case the undertaking is that if the demand cannot be collected by legal proceedings the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect of him by those means are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor." *Rapallo, J., McMurray vs. Noyes*, 72 N. Y. 524.

See also *Beardsley vs. Hawes*, 71 Conn. 39; 40 Atl. 1043; *Evans vs. Bell*, 45 Tex. 553.

No special form of words is required to bring the contract within this class of guaranties. Any words which fairly import that the creditor shall first pursue the debtor makes the promisor a mere insurer of the debtor's solvency and not liable until the conditions are performed, such as "I warrant this note good" ⁴⁸ or "I guarantee the within note good until paid" ⁴⁹ or "We will pay it, provided you can't collect it off of them" ⁵⁰ or "liable only in the second instance" is held to fairly import a guaranty only after the one primarily liable had been diligently prosecuted. ⁵¹

§63. Test of due diligence.

There is a difference of holding as to what constitutes due diligence on the part of the creditor so as to create a cause of action against the guarantor of collectibility.

The view which is supported by the weight of authority, and apparently by the most forcible reasoning is that "due diligence" does not require a legal proceeding against the principal nor even a demand where he is in fact financially irresponsible. ⁵²

⁴⁸ Curtis vs. Smallman, 14 Wend. (N. Y.) 231.

⁴⁹ Cowles vs. Peck, 55 Conn. 251; 10 Atl. 569.

⁵⁰ Ordeman vs. Lawson, 49 Md. 135.

⁵¹ Pittman vs. Chisolm, 43 Ga. 442.

⁵² In Camden vs. Doremus, 3 How. 515, an indorser took from his indorsee an agreement that in event of default the indorsee would use "due diligence" to collect from the several makers. Action was brought against the makers, but no execution was issued against some of them known to be insolvent. Held "The diligent and honest prosecution of a suit to judgment with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence. This phrase and

the obligation it imports, may be satisfied, however, by other means. The ascertainment, upon correct and sufficient proofs, of entire or notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing, under such circumstances, with the more dilatory evidence of a suit."

See also Perkins vs. Catlin, 11 Conn. 213; Stone vs. Rockefeller, 29 O. S. 625; McClurg vs. Fryer, 15 Pa. 293; Woods vs. Sherman, 71 Pa. 100; Marsh vs. Day, 18 Pick. 321; Miles vs. Linnell, 97 Mass. 298; Dana vs. Conant, 30 Vt. 246; Benton vs. Fletcher, 31 Vt. 418; Peck vs. Frink, 10 Iowa 193; Brackett vs. Rich, 23 Minn. 485; Dillman vs. Nadelhoffer, 160 Ill. 125; 43 N. E. 378; Middle States L. B. & C. Co. vs. Engle, 45 W. Va. 588; 31 S. E.

Opposed to this are many decisions in courts of high standing holding that the non-collectibility of the debt as against the principal can only be established by a process of law resulting in a judgment and execution with a return of nulla bona, and that the fact of non-collectibility can not be shown by any other evidence than that of a fruitless prosecution of a suit against the principal.⁵³

The mere bringing of an action is not an infallible test of diligence; one may prosecute an action in such a way as to be barren of results. If the creditor knows of assets belonging to

921; Dewey vs. Clark Invest. Co., 48 Minn. 130; 50 N. W. 1032; Craig vs. Parkis, 40 N. Y. 187. (Dissenting opinion, *Mason, J.*) "The rule which requires the creditor, in such case, to use due diligence to collect the debt of the principal, is just and reasonable, and should be enforced, as well for its reasonableness as for the unbroken current of authority with which it is supported. The rule is not however in my judgment inflexible. It is like most general rules; it has its exceptions. It cannot be maintained upon principle, as the unbending rule, under all conceivable circumstances. If the principal is and has been, from the time the right to bring suit against him has accrued, utterly and hopelessly insolvent, with no property, out of which anything could be collected, then the reason of the rule, which requires the principal debtor to be prosecuted to judgment and execution with all diligence ceases, and the familiar maxim of law '*ces-sante ratione legis, cessat ipsa lex*,' steps in and relieves the creditor from the rule of diligence in prosecuting his suit. The reason of the rule ceasing, the rule itself must cease.

"This must be so, unless we are

prepared to hold that the creditor should lose his debt for the want of due diligence in doing a vain, idle and useless thing. The law is said to be the perfection of human reason, and should not be subject to such a reproach."

Of course, if the debtor is solvent at the time of the default and the suit is delayed until he becomes insolvent, the guarantor is discharged because of the failure to bring suit in the first instance. *Crane vs. Wheeler*, 48 Minn. 207.

⁵³*Craig vs. Parkis*, 40 N. Y. 181; *French vs. Marsh*, 29 Wis. 649; *Bos-man vs. Akeley*, 39 Mich. 710; *Blanding vs. Shepard*, 101 App. Div. 442 (N. Y.).

The reason usually urged in support of this view is that if the bringing of an action is a condition precedent, then the guarantor may insist upon it, although of no benefit to himself, that the parties have contracted to have the question of insolvency tested by a proceeding brought directly for that purpose by employing the ordinary measures provided by law for the collection of debts. That the standard or means of testing solvency being fixed by the parties the court should not substitute a new standard by showing insolvency by the mere opinion of witnesses.

the debtor and fails to inform the sheriff holding the execution, a return of *nulla bona* by the officer, while *prima facie* evidence of diligence, ought not to be conclusive.⁵⁴

What constitutes due diligence, either with or without legal action, must depend upon the circumstances of each particular case and the determination of the question is within the undoubted province of the jury,⁵⁵ although some courts have considered it altogether a question of law for the court.⁵⁶

If the creditor relies upon the insolvency of the principal as a justification for not bringing suit, the burden is upon him to show such insolvency of the principal as would make legal action against him of no avail.⁵⁷

✓ §64. Notice to guarantor of acceptance of the guaranty and advancements thereon.

The guarantor is generally in a position where he will have no knowledge at the time he makes his contract of the intention of the creditor to make advances relying upon his guaranty.

If he is guarantor of a promissory note, the guaranty does not take effect until the delivery of the paper to the payee, and it has been urged with much plausibility that the acceptance of the note relying upon such guaranty ought not to be binding upon the guarantor, unless notice of such acceptance is given, thus placing the guarantor in a position where he may protect himself from loss so far as the circumstances will permit, and that such knowledge on the part of the guarantor necessarily regulates his conduct in the exercise of vigilance in respect to the affairs of the debtor.

The same reasoning applies to a guaranty of a debt in consideration of an extension for a definite time. In each case,

⁵⁴ Hoffman vs. Bechtel, 52 Pa. 194.

⁵⁵ Nat. Loan & Bldg. Soc. vs. Lichtenwalner, 100 Pa. 103.

⁵⁶ Graham vs. Bradley, 5 Humph. (Tenn.) 476.

But see Mead vs. Parker, 111 N. Y. 262; 18 N. E. 727, where it is held to be a mixed question of law

and fact to be submitted to the jury only when the facts are in dispute, or if undisputed, they are of such a nature that reasonable men might differ in regard to the inferences proper to be drawn from them.

⁵⁷ Allen vs. Rundle, 50 Conn. 9.

the amount of the obligation of the principal and the exact time of payment are known to the guarantor at the time he signs the agreement, but in both cases he may have no means of knowing whether the creditor accepts the arrangement, if notice of acceptance is to be considered unnecessary.

A general letter of credit authorizing advancements to the debtor in such amounts as he should ask for, and upon such terms of credit as the debtor should desire places the guarantor at a still greater disadvantage, as in such a case he not only does not know whether the creditor will accept the proposition, but he has no means of knowing how much will be advanced, or when the debt will mature. These relations of the parties have given rise to three questions relating to notice of acceptance of the guaranty.

(1) Whether in the case where the amount of the debt and the time of payment are fixed notice of acceptance is required to bind the guarantor.

(2) Whether the guarantor may require notice where the amount of the debt or the time of payment are indefinite, such as a general letter of credit for future advancements.

(3) Whether the guarantor may not only require notice of an acceptance of the guaranty but where the amount and time of payment are not fixed at the time of his agreement, whether he may also require notice of the amount of the advancement when made and the time when the debt will mature.

These three hypotheses represent the usual field of discussion in the reported cases. There is perhaps but one question involved in all of these, and that is, whether a contract of guaranty in respect to notice of acceptance is essentially different from any other contract.

A merchant sends a mail order for merchandise to be manufactured and shipped at some future date convenient to the shipper. He has no means of knowing whether the order will be accepted or when it will be shipped, yet this contract, when made complete by performance on the part of the vendor, does not depend for its validity upon notice of acceptance, and is not

affected by the uncertainty as to whether the order will be accepted. The sending of such an order without stipulating that it is subject to notice of acceptance is a waiver of all the inconvenience and disadvantage which the uncertainty of such an arrangement may place upon the vendee.

It may be said that as between vendor and vendee the latter always has notice by the mere receipt of the goods that his order has been accepted and that there is no corresponding constructive notice coming to the guarantor; but this knowledge by the vendee is no necessary part of his contract, and the performance of the contract by the vendor which precedes the receipt of the goods fixes the liability of the vendee.

The fact that the guarantor does not know the amount or the time of the advancements is sometimes construed to put him in the position of making a mere offer of guaranty, and it is said an offer to contract is not binding upon the one making the offer until accepted by the one to whom it is addressed. This, however, does not of itself advance the argument in respect to the necessity for notice, since an acceptance of an offer may either take the form of a communication to the offerer, or consist in the doing of the thing which is the subject of the proposal.

The argument so often insisted upon that notice enables the guarantor to watch the debtor's affairs and so lighten his prospective loss is not sound in principle as it only applies in certain cases.

If the debtor is solvent and remains solvent or if insolvent and remains insolvent, notice of acceptance or lack of such notice does not in any way affect the guarantor.

The conceded equity of suretyship that the creditor must refrain from doing anything which will increase the burden assumed by the promisor, does not put upon the creditor any duty of assisting the promisor to escape a loss by means of timely notice or any other act of courtesy.

Although courts of last resort have widely differed upon the question of notice of acceptance and advancements, upon principle, the conclusion seems to be:

(1) The essential ingredients of a contract in suretyship

are the same as a simple contract and notice of acceptance is not necessary to the inception of the contract.

(2) The condition of notice of acceptance of guaranty or advancements thereon not being stipulated, such condition will not be implied from the fact that lack of notice in some cases increases the risk of the undertaking, and in this respect the principle is no different whether or not the amount and time of payment is fixed at the time of the guaranty.

§65. Federal court rule as to notice of acceptance of guaranty.

The case of *Russell vs. Clark*⁵⁸ decided by Chief Justice Marshall in 1812 was probably the earliest case in the United States Supreme Court to announce any rule on the subject of notice of acceptance to the guarantor. The defendants in this case wrote two letters recommending the debtors to credit, and advancements were made relying upon the recommendations, and after default the plaintiffs sought to charge the defendants as guarantors. Mr. Justice Marshall held that the letters did not constitute a contract of guaranty to which decision by way of *obiter dictum* the eminent Chief Justice added: "Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagements."

In *Edmonston vs. Drake*,⁵⁹ decided in 1831, notice of acceptance was given to the guarantor and the Chief Justice again takes occasion to express his view on this point, although not involved in the case, and he says: "It would indeed be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions (which is an important principle in the law and usage of merchants) if a merchant should act on a letter of this character, and hold the writer responsible without giving notice to him that he had acted on it."

In *Douglass vs. Reynolds* (1833),⁶⁰ the question was fairly presented and the rule made the subject of an authoritative

⁵⁸ 7 Cranch 69.

⁶⁰ 7 Pet. 113.

⁵⁹ 5 Pet. 637.

decision for the first time wherein Mr. Justice Story says: "A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit upon the footing of it or not."

In 1836, the court after citing the three cases above mentioned, says: "We see no reason for departing from the doctrine so long and so fully settled in this court,"⁶¹ and in this case the guaranty was of a bill of exchange for a fixed amount payable at a definite time.

While much is said in these cases about the disadvantage under which the guarantor is placed by not receiving notice of acceptance, such as not being able to exercise vigilance over the affairs of the debtor, yet the ground upon which these adjudications rest is that acceptance of a guaranty is essential to the inception of the contract.⁶²

The Federal Court rule, therefore, may be stated to be that notice of acceptance of the guaranty is essential to the validity of the contract. Important modifications or exceptions to the

⁶¹ Lee vs. Dick, 10 Pet. 496.

See also Adams vs. Jones, 12 Pet. 207 (1838), where the rule is affirmed upon the authority of the four cases cited in the text. "This is not now an open question in this court, after the decisions which have been made in Russell vs. Clarke, Edmondson vs. Drake, Douglas vs. Reynolds, Lee vs. Dick. . . . It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him; and to avail himself of the appropriate means in law and equity to compel the other parties to discharge him from future responsibility."

See also Reynolds vs. Douglass, 12 Pet. 497; Cremer vs. Higginson, 1 Mason 323.

⁶² "He has already had notice of the acceptance of the guaranty, and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; it is deemed essential to an inception of the contract." Louisville Mfg. Co. vs. Welch, 10 How. 461.

See also Davis vs. Wells, 104 U. S. 165, *Mathews, J.*: "The rule in question proceeds upon the ground that the case in which it applies is an offer or a proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete and may be withdrawn by the proposer."

rule have, however, somewhat reduced its application even in the Federal Court.

The rule will not be applied if the failure to give notice works no hardship on the guarantor, such as where the debtor is insolvent and remains insolvent or where he is solvent and remains solvent.

Nor where the guaranty is made at the request of the creditor, for in such a case the proposal is said to come from the creditor, of which the guaranty is itself the acceptance, and hence the elements of mutual assent are supplied.^{62a}

Nor where there is a valuable consideration moving from the creditor other than the expected advances, thus, if the letter of credit states that it is in consideration of one dollar received from the creditor, although such consideration is not paid, and even though such letter is the initiatory act in the transaction, mutual assent will be necessarily implied.⁶³

The only case on which the Federal Court rule now operates appears to be where no consideration from the creditor is expressed, and the guarantor can show that failure to receive notice has operated to his detriment by reason of the changed financial condition of the debtor.

The elaborate generalizations of the earlier cases have been reduced to a more practical basis by the later decisions, and the proposition that acceptance is necessary to the inception of the contract of guaranty is logically repudiated by the exception relating to the financial condition of the debtor.

Formal acceptance is held, however, not to be necessary. A communication from the creditor to the guarantor advising him that he has received the letter and made the advances will satisfy the requirements of an acceptance.⁶⁴

^{62a} *McFarlane vs. Wadhams*, 165 Fed. 987.

⁶³ *Davis vs. Wells*, 104 U. S. 159; *Davis Sewing Mch. Co. vs. Richards*, 115 U. S. 524, 6 S. Ct. 173; *Barnes vs. Reed*, 84 Fed. Rep. 603; *Butvier vs. Baldwin*, 137 Mich. 263; 100 N. W. 468; *Bond vs. John V. Farwell Co.*, 172 Fed. 58; 96 C. C. A. 546; *McConnon & Co. vs. Lawsen*, 135 N. W. 213; 22 N. D. 604.

⁶⁴ *Hart vs. Minchen*, 69 Fed. Rep. 520.

Notice of acceptance will also be presumed from circumstances which show that the guarantor had actual knowledge of the fact that the creditor has acted upon the guaranty. See *First Nat'l Bank Dubuque vs. Carpenter*, 41 Iowa 518; *Adams vs. Jones*, 12 Pet. 207; *Powell vs. Chi-*

§66. Rule of the state courts as to notice of acceptance of guaranty.

A number of the States have rejected the rule in force in the Federal Court. New York and Ohio and several other States of commercial importance have asserted the doctrine that notice of acceptance of a guaranty is neither essential to the inception of the contract nor a condition of the liability of the guarantor.

The fundamental basis of the rule in these States is that a suretyship contract is no different in this respect than any other contract. "By the common law no notice of acceptance of any contract was necessary to make it binding, unless it be made a condition of the contract itself, and that contracts of guaranty do not differ in that respect from other contracts."⁶⁵

The usual expression of these courts is that notice of acceptance is not required in the case of an absolute guaranty. The term "absolute" guaranty in this connection, however, means merely where no *condition of acceptance* is stipulated, either expressly or by necessary implication. All other conditional guaranties which do not include this particular condition, such as a general guaranty of collectibility, will be considered "absolute" in the sense the term is used.

In one of the earlier New York cases, the letter of credit invited the plaintiff to sell goods to the principal with the promise to guarantee payment. The goods were so delivered but no notice of acceptance was given the guarantor. The holding in this case is the basis of many other decisions in New York and elsewhere. "If the defendant wanted notice, and did not get it from the persons whom he thought worthy of credit, it was his business to inquire and ascertain what had been done. There is nothing in the defendant's undertaking which looks like a condition, or even a request, that the plaintiffs should give him notice if they acted upon the guaranty; and there is no

cago Carpet Co., 22 Ill. App. 409; Mitchell vs. Railton, 45 Mo. App. 273; Oaks vs. Weller, 16 Vt. 63.

guarantor by the principal debtor will be sufficient.

⁶⁵ Union Bank vs. Coster, 3 N. Y. 212.

It is generally held that notice of acceptance communicated to the

principle upon which we can hold that notice was an essential element of the contract.”⁸⁶

In the States which maintain the contrary view, there is no uniformity of reasoning in support of the rule in force; the majority, perhaps, standing upon the proposition that a letter of credit relating to future advancement is a mere offer to contract in suretyship which requires mutual assent to become binding.^{86a}

⁸⁶Smith vs. Dann, 6 Hill, 544.

See also City Nat. Bank vs. Phelps, 86 N. Y. 484.

In Whitney vs. Groot, 24 Wend. 82, the letter of credit was “We consider Mr. J. V. E. good for all he may want of you, and we will indemnify the same.” The Court says: “The instrument did not contemplate any notice of acceptance, or of the sales to the defendant made in pursuance of it; it was not a proposition to become surety for Van Eps, but an absolute undertaking to pay for the goods if he did not, and obviously contemplated a sale and delivery on presentation. Unless there is something in the nature of the contract or terms of the writing creating or implying the necessity of acceptance or notice as a condition of liability, neither are deemed requisite.”

The following cases are in accord with the New York doctrine: Powers vs. Bumeratz, 12 O. S. 273; Wise vs. Miller, 45 O. S. 388; 14 N. E. 218; Boyd vs. Snyder, 49 Md. 325; Crittenden vs. Fiske, 46 Mich. 70; 8 N. W. 714; Platter vs. Green, 26 Kans. 252; Wilcox vs. Draper, 12 Neb. 138; 10 N. W. 579; Klosterman vs. Olcott, 25 Neb. 382; 41 N. W. 250; Bright vs. McKnight, 1 Sneed (Tenn.) 158; Yancey vs. Brown, 3 Sneed 89; Bank of California vs.

Union Packing Co., 111 Pac. 573; 60 Wasb. 456; Cowan vs. Roberts, 134 N. C. 415; 46 S. E. 979; Watkins Medical Co. vs. Brand, 143 Ky. 468; 136 S. W. 867; Am. Exchange Bank vs. Seaverns, 121 Ill. App. 480; Pressed Radiator Co. vs. Hughes, 155 Ill. App. 80; Frost vs. Standard Metal Co., 215 Ill. 240; 74 N. E. 1039; Stewart vs. Sharp County Bank, 71 Ark. 585; 76 S. W. 1064; Sheffield vs. Whitfield, 6 Ga. App. 762; 65 S. E. 807; Sheppard vs. Daniel Miller Co., 7 Ga. App. 760; 68 S. E. 451.

^{86a}Hall's Ex'or vs. Farmers Bank of Ky., 23 Ky. Law Rep. 1450; 65 S. W. 365; Pearsell Mfg. Co. vs. Jeffreys, 183 Mo. 386; 81 S. W. 901; Acme Mfg. Co. vs. Reed, 197 Pa. St. 359; 47 Atl. 205; William Deering & Co. vs. Mortell, 110 N. W. 86; 21 S. D. 159; Miami County Nat. Bank vs. Goldberg, 133 Wis. 175; 113 N. W. 391; King vs. Batterson, 13 R. I. 117; J. S. Rowell Mfg. Co. vs. Isaacs, 128 S. W. 760; 144 Mo. App. 58; J. R. Watkins Medical Co. vs. McCall, 133 N. W. 966; 116 Minn. 389; Lester Piano Co. vs. Romney, 126 Pac. 325 (Utah); Black, Starr & Frost vs. Grabow, 216 Mass. 516; 104 N. E. 346; Asmussen vs. Post Printing & Pub. Co., 143 P. 396 (Col.).

The reasoning along this line becomes rather vague where an attempt is made to combine the idea of mutual assent with that of protection to the guarantor. Notice as an equity in favor of a guarantor to enable him to protect himself against loss need not be urged at all if mutual assent is necessary to the inception of the contract.

In Massachusetts, it seems to be conceded that an acceptance is not necessary to the inception of the contract of guaranty, but that the guarantor has a right to know whether a contract has been made, that is, whether the creditor has acted on the proposal, and if he does not get such knowledge, either by notice from the creditor or (semble) from some other source, he may withdraw the guaranty even though the creditor has acted upon it. Thus, it is said: "The language relied on was an offer to guarantee, which the plaintiff might or might not accept. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not come quickly to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence so that the promisor may know that the contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act *so far that the promisee can not be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor.*" ⁶⁷

⁶⁷ Knowlton, J., in *Bishop vs. Eaton*, 161 Mass. 499; 37 N. E. 665; *90 N. E. 875; Cumberland Glass Mfg. Co. vs. Wheaton*, 208 Mass. 425; 94 N. E. 803. *Lascelles vs. Clark*, 204 Mass. 362;

Where the contract of guaranty is executed contemporaneously with and as a part of the consideration for, the transaction guaranteed, notice of acceptance is not required.^{67a}

Where a guarantee is given in response to a request for it by the creditor, no notice to the guarantor that he has been accepted is necessary to bind him.^{67b}

Where the guaranty states a consideration moving directly from the guarantee to the guarantor this is sufficient to show an absolute contract of guaranty as distinguished from a mere offer of guaranty.^{67c}

The rule of a large number of jurisdictions makes lack of notice of acceptance a defense to the extent of the loss which the guarantor suffers by not receiving notice, not requiring such notice to be immediate but within a reasonable time. These cases are generally in accord with the Federal Court except as to the grounds upon which the decisions rest.⁶⁸

^{67a} Closson vs. Billman, 161 Ind. 610; 69 N. E. 449.

Contra—American Agricultural Chem. Co. vs. Elsworth, 83 A. 546; 109 Me. 105.

^{67b} Nelson Mfg. Co. vs. Shreve, 94 Mo. App. 518; 68 S. W. 376; Stewart vs. Sharp County Bank, 71 Ark. 585; 76 S. W. 1064; McFarlane vs. Wadhams, 165 Fed. 987; Tilt-Kennedy Shoe Co. vs. Haggarty, 43 Tex. Civ. App. 335; 114 S. W. 386; Hill Mercantile Co. vs. Rotan Grocery Co., 127 S. W. 1080 (Tex.); J. L. McKittrick Iron Works vs. Clark, 62 S. E. 227; 87 S. C. 189; Shows vs. Steiner, Logman & Frank, 57 So. 701; 175 Ala. 343.

Contra—Acme Mfg. Co. vs. Reed, 197 Pa. St. 359; 47 Atl. 205; American Agricultural Chem. Co. vs. Ellsworth, 83 A. 546; 107 Me. 105.

^{67c} Emerson Mfg. Co. vs. Rustad, 120 N. W. 1094; 15 N. D. 8; Buhrer vs. Baldwin, 137 Mich. 263; 100 N. W. 468; Shows vs. Steiner, Lobman

& Frank, 57 So. 701; 175 Ala. 363; McConnon & Co. vs. Laursen, 135 N. W. 213; 22 N. D. 604.

Contra—Acme Mfg. Co. vs. Reed, 197 Pa. St. 359; 47 Atl. 205; American Agricultural Chem. vs. Ellsworth, 83 Atl. 546; 109 Me. 195.

⁶⁸ Mussey vs. Rayner, 22 Pick. 223; Winnebago Paper Mills vs. Travis, 56 Minn. 480; 58 N. W. 36; Central Savings Bank vs. Shine, 48 Mo. 456; Tolman Co. vs. Means, 52 Mo. App. 385; Walker vs. Forbes, 25 Ala. 130; Cahuzac vs. Samini, 29 Ala. 288; McCollum vs. Cushing, 22 Ark. 540; Rapelye vs. Bailey, 3 Conn. 438; Craft vs. Isham, 13 Conn. 28; Buckingham vs. Murray, 7 Houst. 176; Coe vs. Buehler, 110 Pa. 366; 5 Atl. 20; Evans vs. McCormick, 167 Pa. 247; 31 Atl. 563; Wilkins vs. Carter, 84 Tex. 438; 19 S. W. 997; Woodstock Bank vs. Downer, 27 Vt. 539; Noyes vs. Nichols, 28 Vt. 159; Ellis vs. Jones, 70 Miss. 60; 11 South. 566; Tuckerman vs.

A stipulation that the guarantor shall receive notice of *default* has been held to imply a waiver of notice of acceptance.⁶⁹ The right to receive such notice is also waived by a subsequent promise to pay.⁷⁰ It is not necessary that the notice of acceptance come from the creditor. Knowledge is equivalent to notice from whatever source derived and will operate as sufficient notice if acquired within a reasonable time.^{70a}

§67. Notice to guarantor of default of principal.

A guaranty of payment or performance at a definite time involves no duty on the part of the creditor to give notice of default to the guarantor.

The liability of the guarantor becomes absolute by the default unless notice is stipulated in the contract.

If the guarantor is to stand merely upon the express terms of his contract there is no ground for demanding notice unless such condition is incorporated in his agreement. The law merchant which gives the endorser the right of notice without stipulating such condition in the contract does not apply to the guarantor.

French, 7 Me. 115; Ruffner vs. Love, 33 Ill. App. 601; Meyer vs. Ruhstadt, 66 Ill. App. 346.

No distinction is made in these cases between contracts for definite time and amount and contracts for future optional advances.

In Indiana notice is not required if the guaranty is for a definite amount payable at a definite time. Kline vs. Raymond, 70 Ind. 271; Snyder vs. Click, 112 Ind. 293; 13 N. E. 581.

But see Wright vs. Griffith, 121 Ind. 478; 23 N. E. 281. In this case the letter reads: "Please let my daughter, Mrs. H., have what goods she wants and I will stand good for the money to settle the bills." Held

to require no notice of its acceptance. Stewart vs. Knight & Jillson Co., 166 Ind. 498, 76 N. E. 743.

⁶⁹ Wadsworth vs. Allen, 8 Gratt. 174.

Contra—Taylor vs. McClung, 2 Houst. (Del.) 24.

⁷⁰ Gamage vs. Hutchins, 23 Me. 565; Sigourney vs. Wetherell, 6 Met. 553; Ashford vs. Robinson, 8 Ired. 114.

^{70a} Cumberland Glass Mfg. Co. vs. Wheaton, 208 Mass. 425; 94 N. E. 803; Greer Machine Co. vs. Sears, 23 Ky. Law Rep. 2025; 66 S. W. 521; Pearsell Mfg. Co. vs. Jeffreys, 183 Mo. 386; 81 S. W. 901; Nelson Mfg. Co. vs. Shreve, 94 Mo. App. 518; 68 S. W. 376.

The lack of notice puts no burden upon the guarantor as he knows the date of the maturity of the obligation and may, therefore, take such steps as are necessary to protect his interests in case of non-performance by the principal.

A guaranty upon the back of a note reading "For value, I hereby guarantee the payment of the within note" was held to import an absolute obligation to pay if the maker did not, and that no notice of default was necessary to bind the guarantor. In this case, there was a prior indorser upon whom the guarantor might have relied if notice of default had been given such indorser, but the holder gave no such notice to either the guarantor or the prior indorser, and the guarantor had no knowledge of the non-payment until more than a year after maturity. The maker of the note was solvent at maturity and insolvent at the time of notice to the guarantor. By this lack of timely notice the guarantor lost his recourse against both the maker and the prior indorser. But the Court says: "The nature of the obligation of the guarantor is affected by the character of the principal contract to which the guaranty relates. The note expressed the absolute obligation of the maker to pay the sum named at the specified date of maturity or before. The guaranty of 'the payment of the within note' imported an undertaking, without condition, that, in the event of the note not being paid according to its terms,—that is, at maturity,—the guarantor should be responsible.

"The non-payment of the note at maturity made absolute the liability of the guarantor, and an action might at once have been maintained against him without notice or demand. Such was the effect of the unqualified guaranty of the payment of an obligation which was in itself absolute and perfect and certain as respects the sum to be paid, and the time when payment should be made,—all of which was known to the guarantor, and appears upon the face of the contract.

"The liability of the guarantor thus becoming absolute by the non-payment of the note, the neglect of the holder to pursue such remedies as he might have against the maker (the guar-

antor not having required him to act) would not discharge the already fixed and absolute obligation of the guarantor, nor would neglect to notify the guarantor of the non-payment have such effect."⁷¹

⁷¹ *Hungerford vs. O'Brien*, 37 Minn. 306; 34 N. W. 161.

See also *Deck vs. Works*, 57 How. Pr. 292.

In *Brown vs. Curtiss*, 2 N. Y. 230, the Court says: "The direct engagement of the indorser of a negotiable note, and of the guarantor of the payment of a note, whether negotiable or not, is the same. Both undertake that the maker will pay the amount when it shall become due. If there is a failure in such payment, both contracts are broken. Ordinarily, upon the breach of a contract, the party bound for its performance immediately becomes liable for the consequent damages. In the case of the indorser of a negotiable promissory note, however, the liability does not become absolute, unless due notice of non-payment is given to the party whom it is intended to charge. That is not because the indorser has thus stipulated in terms, but it is a condition annexed by the rules of the commercial law.

"In the case of a guarantor there is nothing to exempt him from the ordinary liability of parties who have broken their contracts, which is direct and not conditional. No condition requiring notice of non-payment is inserted in the contract, nor is any inferred by any rule of law. The guarantor is bound to ascertain for himself whether his contract has been performed, and can easily obtain the requisite information from the party for whose conduct he has assumed the responsibility. If he fails to do that, there

is no principle which would authorize him to inflict upon another the consequences of his own neglect."

See also *Reads vs. Cutts*, 7 Greenl. 186; *Breed vs. Hillhouse*, 7 Conn. 523; *Allen vs. Rightmere*, 20 Johns. 365; *Campbell vs. Baker*, 46 Pa. 243; *Roberts vs. Riddle*, 79 Pa. 468; *Bank vs. Sinclair*, 60 N. H. 100; *Dickerson vs. Derrickson*, 39 Ill. 574; *Penny vs. Crane Bros. Mfg. Co.*, 80 Ill. 244; *Wright vs. Dyer*, 48 Mo. 525; *Kline vs. Raymond*, 70 Ind. 271; *Clay vs. Edgerton*, 19 O. S. 549; *Castle vs. Rickly*, 44 O. S. 490; 9 N. E. 136; *Walton vs. Mascall*, 13 M. & W. 72; *First Bank vs. Babcock*, 94 Cal. 96; 29 Pac. 415; *Hoover vs. McCormick*, 84 Wis. 215; 54 N. W. 505; *Wright vs. Shorter*, 56 Ga. 72; *Roberts vs. Hawkins*, 70 Mich. 566; 38 N. W. 575; *Holmes vs. Preston*, 71 Miss. 541; 14 South. 455; *Flenham vs. Steward*, 45 Neb. 640; 63 N. W. 924; *Heyman vs. Dooley*, 77 Md. 162; 26 Atl. 117; *McKee vs. Needles*, 123 Ia. 195; 98 N. W. 618; *Braddock vs. Wertheimer*, 68 Ark. 423; 59 S. W. 761; *Stewart vs. Sharp County Bank*, 71 Ark. 585; 76 S. W. 1064; *Stewart vs. Knight & Jellson Co.*, 16 Ind. 498; *Pleasantville Loan Society vs. Moore*, 70 N. J. L. 306; 57 Atl. 1034; *Pfaelzer vs. Kau*, 207 Ill. 116; 69 N. E. 914; *Miller vs. Lewiston Nat. Bank*, 108 P. (Idaho) 901; *People's Bank vs. Stewart*, 152 Mo. App. 314; *Booth vs. Irving Nat. Exch. Bank*, 116 Md. 668; *Providence Machine Co. vs. Browning*, 68 S. C. 1; 46 S. E. 550; *Tilt-Kenney Shoe Co. vs. Haggarty*,

This rule will not logically admit of any modification in the cases where actual damage results to the guarantor from lack of notice, at the same time holding to the rule where no damage is shown. The modified rule held by some courts that the guarantor of definite payment is discharged by lack of notice of default to the extent of his damage resulting from lack of notice comes to this, that if the guarantor is diligent and gives such attention to his outstanding obligations as enables him to escape additional loss without notice, then notice is not necessary to fix his liability.

But if by lack of diligence and inattention he meets a loss which notice would have averted, then lack of notice is a defense.⁷²

43 Tex. Civ. App. 335; McConnon vs. Laursen, 135 N. W. 213; 22 N. D. 604.

The great uniformity of holding on this point as well as the forcible logic of the decisions renders somewhat conspicuous the few cases maintaining the opposite view.

See Ringgold vs. Newkirk, 3 Ark. 96; McCollum vs. Cushing, 22 Ark. 540; Cox vs. Brown, 51 N. C. 100; Reynolds vs. Edney, 53 N. C. 406; Mayberry vs. Bainton, 2 Harr. (Del.) 24; Oxford Bank vs. Haynes, 8 Pick. 477; Brown vs. Spiegel, 156 Mich. 138; 120 N. W. 579; Andrews vs. Pope, 126 N. C. 472; 35 S. E. 817; Shores-Mueller Co. vs. Knox, 141 N. W. 948. See Lemmert vs. Guthrie Bros., 69 Neb. 499, where the court said: "The guarantor's contract is a guaranty of the maker's solvency, and unless there is a different intention expressed in the contract, he is entitled to reasonable notice of the default of the maker."

⁷² The modified rule that lack of notice discharges the guarantor of a definite payment or performance to the extent of the loss, appears to be

in force in several States. Fuller vs. Scott, 8 Kan. 25; Withers vs. Berry, 25 Kan. 373; Lewis vs. Brewster, 2 McLean 21; Gamage vs. Hutchins, 23 Me. 565; Globe Bank vs. Small, 25 Me. 366; Oxford Bank vs. Haynes, 8 Pick. 423; Talbot vs. Gay, 18 Pick. 534; Whiton vs. Mears, 11 Met. 563; Farrow vs. Respass, 11 Ired. 170; Cox vs. Brown, 6 Jones (N.C.) 100; Swisher vs. Deering, 204 Ill. 203; 68 N. E. 517. But see Pfäelzer vs. Kau, 207 Ill. 116; 69 N. E. 914.

In Iowa, if the guarantor is an accommodation party he cannot be held without notice of default, unless the plaintiff alleges and proves as a part of his *prima facie* case that the guarantor was not damaged by lack of notice. Sabin vs. Harris, 12 Iowa 87; Pickett vs. Hawes, 14 Iowa 400.

If, however, the guaranty is made by the payee, or a party in the chain of title, the guarantor must assume the burden of alleging and proving damage to himself from lack of notice, and may set off such damage against his liability. Peck vs. Frink, 10 Iowa 193; Martyn vs. Lama, 75 Iowa 235; 39 N. W. 285.

In Massachusetts, the Court has adopted the view that although notice of default is not a condition of the contract and the liability of the guarantor attaches immediately upon default and without notice, yet the guarantor may be damaged by the negligence of the creditor in not making seasonable demand upon the guarantor, and for such damage he may claim set-off.

"Negligence of the holder of the guaranty, in permitting the claim to slumber, when the guarantor might reasonably suppose it had been paid when due, or in the usual course of business, is the real ground on which the guarantor is exonerated. It is delay without notice, and not the bringing of a suit without notice, that is fatal to the holder of the guaranty.

"This view of the law places guaranties upon the same footing with other contracts where the right of action accrues upon the performance or non-performance of some act by a third party."⁷³

§68. Cases in which notice to guarantor of default is necessary.

(1) Where notice is stipulated for in the contract failure to give such notice will discharge the guarantor altogether, and

⁷³ Vinal vs. Richardson, 13 Allen 532. The rule stated in the text has been modified by the later Massachusetts decisions. Watertown Ins. Co. vs. Simmons, 131 Mass. 85; and Welch vs. Walsh, 177 Mass. 555; 59 N. E. 440. In the latter case the guarantor of a lease was held not discharged from liability, although the lessor did not notify the guarantor of the default of the lessee until after twenty-three months had elapsed, during fifteen of which the lessee had abundant property. The court said: "We are of opinion that when the obligation of the guarantor is to pay a definite sum at a definite time, it is his

duty to see that the sum guaranteed is paid, and that there is no duty on the creditor to give notice to the guarantor of a default in payment by the principal debtor, and that if the guarantor, in violation of his duty, has slumbered because he supposed that in the absence of a demand by the creditor the act guaranteed had been performed by the principal debtor and has suffered damage from so doing, he has nothing of which he can complain but his own negligence, and is liable to pay the sum which he guaranteed should be paid." See also Cumberland Glass Mfg. Co. vs. Wheaton et al., 208 Mass. 425; 94 N. E. 803.

he may avail himself of this defense without showing himself damaged in any amount by not receiving notice.

It is like any other conditional contract, and can not be enforced except upon performance of the condition.

(2) Notice of default within a reasonable time is necessary where the facts upon which the guarantor's liability rest are not within the guarantor's knowledge or depend upon the creditor's option. If it is a guaranty of collectibility the non-payment at maturity is not the default which fixes the liability, but it is the insolvency of the principal debtor which is the basis of the claim against the guarantor. If it is stipulated that such insolvency shall be tested by legal process, then it is clear that the guarantor does not know and has no means of knowing whether the principal is insolvent or when the creditor will take the necessary steps to find out the debtor's condition, and the same result follows where legal proceedings are deemed the sole test of insolvency, although not stipulated in the contract,⁷⁴ and notice to the guarantor of default under these circumstances is generally held necessary and for the very satisfactory reason that the guarantor can not even by active diligence protect himself without notice.⁷⁵

⁷⁴ Ante Sec. 63.

⁷⁵ "Demand and notice, however, are requisite to charge a guarantor, where the fact on which his liability is made dependent rests peculiarly *within the knowledge* of the guarantor, or *depends on his option*. But where the fact which determines the liability, is one which the guarantor knows, or is bound to know, or which is equally within the power of both parties to ascertain; in other words, where each party has, in legal contemplation, equal means of information, the guarantor must take notice at his peril. The application of the rule requiring demand and notice, founded on the reasons above mentioned, is cleared of all

difficulty, in case of the guaranty of the goodness or collectibility of a debt. The contingency upon which the liability is made dependent, rests upon the *action* of the guarantee, and depends on his *option*. The result of his efforts to enforce the liability of the principal, and the period of their termination are of necessity peculiarly within his knowledge." *Bashford vs. Shaw*, 4 O. S. 267.

See also *White vs. Walker*, 31 Ill. 422; *Taussig vs. Reid*, 145 Ill. 488; 32 N. E. 918; *Farwell vs. Smith*, 12 Pick. 83; *Sylvester vs. Downer*, 18 Vt. 32; *Morris vs. Wadsworth*, 16 Wend. 103.

The same reasons would seem to apply where the debt is payable on demand.⁷⁶

(3) A third class of cases arises out of continuing guaranties of payment for future advancements under a general letter of credit. It is said that notice of default should be given the guarantor because at the time of the contract he does not know the amount of the future advancements, or the date of maturity, and, in this respect, the same argument prevails which is advanced in connection with the question of the guarantor's right to have notice of the acceptance of his guaranty.⁷⁷

The fact of default in this class of cases is not, however, peculiarly within the knowledge of the creditor or dependent upon his option as in the case of guaranty of collectibility or debt due on demand, and the guarantor's means of information as to whether default has been committed are the same as in the case of the guaranty of a definite amount at a definite time. In either case, he does not know of the default except by reliance upon information received after the execution of his contract, and in both cases he may get this information by inquiry of the debtor or creditor; although the reasons for requiring notice of default in these cases are not wholly satisfactory, yet a large number of decisions are to be found supporting the view that notice of default may be required in continuing guaranties of payment, where the guarantor at the time of his contract does not know the amount nor the maturity of the debt.⁷⁸

In all cases where notice of default is required the failure to give such notice within a reasonable time will only discharge the guarantor to the extent of his damage in not receiving notice.⁷⁹

⁷⁶ Waiton vs. Mears, 11 Met. 563; Nelson vs. Bostwick, 5 Hill 37; Douglas vs. Rathbone, 5 Hill 143.

But see Foster vs. Barney, 3 Vt. 60.

⁷⁷ Ante Secs. 64, 65, 66.

⁷⁸ Clark vs. Remington, 11 Met. 361; Mussey vs. Rayner, 22 Pick. 228; Gaff vs. Sims, 45 Ind. 262; Douglass vs. Reynolds, 7 Pet. 113; Davis vs. Wells, 104 U. S. 159; Beebe vs. Dudley, 26 N. H. 249; Walker vs. Forbes, 25 Ala. 139; Milroy vs. Quinn, 69 Ind. 406; Mamerow vs. National Lead Co., 206 Ill. 626; 69 N. E. 504.

⁷⁹ "The guarantor is entitled to a notice, but cannot defend himself

for want of it, unless the notice has been so long delayed as to raise a presumption of payment or waiver, or unless he can show that he has lost, by the delay, opportunities for obtaining securities, which a notice, or an earlier notice, would have secured him. . . . If the notice be delayed a very short time, but by reason of the delay the guarantor loses the opportunity of obtaining indemnity, and is irreparably damaged, he would be discharged from his obligation. But, if the delay were for a long period, and it was nevertheless clear that the guarantor would have derived no benefit from an earlier notice, the delay

A waiver of demand and notice of protest endorsed by the guarantor on the back of a promissory note has been held not to be a waiver of notice of nonpayment.^{79a}

A creditor is not required to give notice of default to a guarantor where the guarantor has notice from an independent source, or where it is his duty under the law, to take notice.^{79b} ✓

§69. Joint and several guaranties.

A contract of guaranty executed by two or more persons may amount to a joint obligation, or the liability may be several according as words of severalty or joint obligation are employed. The obligation will be regarded as joint, however, in all cases unless there are express words indicating a several liability.

The intent of the parties in this respect may generally be determined to be joint if expressed in plural form, such as "We guarantee" or it may be made both joint and several by using the words "We or either of us guarantee," but where the form of the contract is singular, but executed by two or more persons, it expresses the intent of the obligors in the majority of cases to hold such promises to be joint and several, and such is the rule.⁸⁰

If the promise is merely joint a judgment against one bars an action against the other.⁸¹

At common law, the estate of a deceased joint obligor is not liable but the survivor will be liable for the entire amount,⁸² whereas if the obligation is several, or joint and several, recourse can be had against the estate of the decedent.

would not impair his obligation." Bank vs. Gaylord, 34 Iowa 246; Lemmert vs. Guthrie Brothers, 69 Neb. 499; 95 N. W. 1046; Swisher vs. Deering, 204 Ill. 203; 68 N. E. 517; Heeringa vs. Ortlepp, 167 Ill. App. 586; Mamerow vs. National Lead Co., 206 Ill. 626; 69 N. E. 504. But see Pfaelzer vs. Kan, 207 Ill. 116; 69 N. E. 914; Davis vs. Wells Fargo & Co., 104 U. S. 159; Booth vs. Irving Nat. Exch. Bank, 116 Md. 668; 82 Atl. 652.

^{79a} Lemmert vs. Guthrie Brothers, 69 Neb. 499; 95 N. W. 1046.

^{79b} Mamerow vs. National Lead Co., 206 Ill. 626; 69 N. E. 504; Graham vs. Middleby, 185 Mass. 349; 70 N. E. 416.

⁸⁰ Fond-du-Lac Harrow Co. vs. Haskins, 51 Wis. 135; 8 N. W. 15. See also Delaware County Nat. Bank vs. King, 95 N. Y. S. 954; East Bridgewater Savings Bank vs. Bates, 191 Mass. 110; 77 N. E. 711; Miller vs. Lewiston Nat. Bank, 108 P. 901; 18 Idaho 124; Wood vs. Farmer, 200 Mass. 209; 86 N. E. 297.

⁸¹ Brady vs. Reynolds, 13 Cal. 32.

⁸² Johnson vs. Harvey, 84 N. Y. 363. In this case it is held that the discharge is as to the creditor only, and the equitable liability for contribution between joint obligors is preserved against the estate of the decedent. New Haven, etc., Co. vs. Hayden, 119 Mass. 361; Seaman vs. Slater, 18 Fed. Rep. 485; Hawkins

§70. Guaranty covers interest.

A guarantor is liable for interest on the debt from the time of the default by the principal.⁸³

This liability for interest increases the amount named as the penalty of the obligation, but is justified because of the fact that the guarantor puts himself in place of the principal and agrees to perform all that the principal is liable for. Also the guarantor may exercise his right to pay the debt at maturity and so avoid all obligation of interest to the creditor.

Interest is due from the date of demand on the principal, or from the maturity of the debt where demand is not necessary to fix the time of payment. If the debt is due upon demand, and no demand is made upon the principal, the bringing of an action against the guarantor or surety will amount to a demand upon them which will fix the date from which interest will be computed.⁸⁴

vs. Ball's Adm., 18 B. Mon. 816; Burgoyne vs. Ohio Life Ins. & Trust Co., 5 O. S. 586.

The estate of the deceased obligor is discharged at common law even though a joint judgment had been entered against him and the principal before the death of the promisor. *Risley vs. Brown*, 67 N. Y. 160.

It seems, however, where a judgment upon a joint obligation becomes a lien on the obligor's land in his lifetime that it will be preserved against his estate. *Baskin vs. Huntington*, 130 N. Y. 313; 29 N. E. 310.

In Ohio the Code now provides that "When two or more persons are indebted in a joint contract, or upon a judgment founded on it, and either of them dies, his estate shall be liable therefor as if the contract had been joint and several, or as if the judgment had been against himself alone." Gen. Code. Sec. 10733. This statute abrogates the common law rule and similar provisions have been enacted by the legislatures of nearly all the States.

Some modifications of the common law rule were made by courts of equity in cases where the deceased joint obligor, participated in the benefits of the contract, such as a joint maker of a promissory note, where the consideration was for the joint use and benefit of the makers.

In such cases, the court construed the obligation as joint and several by employing a fiction that since the contract was jointly and severally for the benefit of both, that it must have been intended for a joint and several obligation, and written by mistake as a joint contract. *Simpson vs. Vaughan*, 2 Atk. 31; *Bishop vs. Church*, 2 Ves. 100.

But the courts declined to extend the fiction to cases where one of the joint obligors was not directly benefited by the contract, as in the case of a surety or guarantor. *Getty vs. Binsse*, 49 N. Y. 385; *Wood vs. Fisk*, 63 N. Y. 245; *Carpenter vs. Broost*, 2 Sandf. 537; *Weaver vs. Shyrock*, 5 Serg. & R. 262.

⁸³ *Gammell vs. Parramore*, 58 Ga. 54; *Gridley vs. Capen*, 72 Ill. 11; *City of New Orleans vs. Clark*, 95 U. S. 644; *French vs. Bates*, 149 Mass. 73; 21 N. E. 237.

⁸⁴ *U. S. vs. Curtis*, 100 U. S. 119; *Sampson Co. vs. Commonwealth*, 208 Mass. 372; 94 N. E. 473; *Empire State Surety Co. vs. Lindenmeier*, 54 Colo. 497; 131 Pac. 437.

Where the obligation is that of a bail bond in which the amount payable is a penalty as distinguished from a debt, interest is not recoverable against the promisor. *U. S. vs. Broadhead*, 127 U. S. 212; 8 S. Ct. 1191. But see *McMullen vs. Winfield Building & Loan Assoc.*, 64

A surety whose undertaking obligates him contingently for unliquidated damages is not considered as in default until notice or demand, and interest does not begin to run upon the amount until then. ^{84a}

§71. Revocation of guaranty.

A contract of guaranty which is merely executory, may be revoked by the guarantor at any time before it is acted upon. So far as affected by this question an executory contract of guaranty may be considered as a mere offer to contract, and not binding until acted upon, and may be withdrawn even though the creditor has given notice to the promisor that he will act upon it. Such notice by the creditor, even in the form of an acceptance of the guaranty, will not bind the creditor to make advances to the principal, and so long as both parties are not bound either may withdraw. ⁸⁵

Where the consideration has wholly passed the guaranty can not be revoked. ⁸⁶

It is not necessary that the creditor should actually make the proposed advances in order to constitute an executed contract. If the creditor has bound himself to make the advances relying upon the guaranty, the guarantor cannot revoke. Where the consideration is divisible, part of which has been advanced, the guaranty may be revoked, after a breach, as to any further advances, providing such future advances are optional with the creditor. ⁸⁷

A revocation will not in all cases become instantly operative. A reasonable time must intervene, that the creditor may have opportunity to adjust his business without loss. A guaranty, for instance, of the faithful performance of duty by one hold-

Kan. 298; 67 Pac. 892, where it was held that "While the penalty of the bond fixes the limit of liability of the surety at the time the liability arises, yet if the principal or surety fail to discharge that liability when it matures, interest may be allowed on the amount from the time the liability arises, even if the amount of recovery shall exceed the penalty."

^{84a} *United States v. Quinn*, 122 Fed. 65; 58 C. C. A. 401; *Folz vs. Tradesman's Trust & Saving Fund*

Co., 201 Pa. 583; 51 Atl. 379; *McDonald v. Loewen*, 130 S. W. 52; 145 Mo. App. 49; *Empire State Surety Co. vs. Lindenmeier*, 54 Colo. 497; 131 Pac. 437.

⁸⁵ *Potter vs. Gronbeck*, 117 Ill. 404; 7 N. E. 586; *Offord vs. Davie*, 12 J. Scott (N. S.) 748; *Jordan vs. Dobbins*, 122 Mass. 168.

⁸⁶ *Green vs. Young*, 8 Me. 14; *Kernochan vs. Murray*, 111 N. Y. 306; 18 N. E. 868.

⁸⁷ *LaRose vs. Logansport Bank*, 102 Ind. 332; 1 N. E. 805; *Hunt vs.*

ing a position of trust will cover damages to the creditor for a reasonable time after notice of revocation.⁸⁸

The death of the guarantor operates as a revocation of the guaranty in all cases where the guarantor might if living have revoked by giving notice.⁸⁹

The death of the guarantor does not *ipso facto* operate as a revocation, but knowledge of the death must be brought home to the creditor.⁹⁰

The death of the guarantor will operate as a revocation even

Roberts, 45 N. Y. 691; Emery vs. Baltz, 94 N. Y. 408; Gay vs. Ward, 67 Conn. 147; 34 Atl. 1025; Singer Mfg. Co. vs. Draughan, 121 N. C. 88; 28 S. E. 136; Metropolitan Washing Machine Co. vs. Morris, 39 Vt. 393; Tischler vs. Hofheimer, 83 Va. 35; 4 S. E. 370; Coulthart vs. Clementson, 5 Q. B. Div. 412; Mamerow vs. National Lead Co., 206 Ill. 626; 69 N. E. 504.

⁸⁸ Bostwick vs. Van Voorhis, 91 N. Y. 353; Reilly vs. Dodge, 131 N. Y. 153; 29 N. E. 1011; LeRose vs. Logansport Nat. Bank, 102 Ind. 332; 1 N. E. 805; Vidi vs. United Surety Co., 140 N. Y. S. 612.

⁸⁹ Jordan vs. Dobbins, 122 Mass. 168; Hyland vs. Habich, 150 Mass. 112; 22 N. E. 765; Valentine vs. Donohoe-Kelly Banking Co., 133 Cal. 191; 65 Pac. 381.

Contra—Bradbury vs. Morgan, 1 Hurl. & Colt. 249.

See also Broome vs. The United States, 15 How. 143; Fewlass vs. Keeshan, 88 Fed. Rep. 573; McClasky vs. Barr, 79 Fed. Rep. 408.

Lloyds vs. Harper, 16 Ch. Div. 290, *Lush, L. J.*: "Now it will be found, I think, that guarantees may, for the purpose of this case, be divided into two classes, the one in which the consideration is entire, and the other in which the consideration is fragmentary, supplied from time to time, and therefore divisible. An instance of the first is

where a person enters into a guarantee that in consideration of the lessor granting a lease to a third person he will be answerable for the performance of the covenants. The moment the lease is granted there is nothing more for the lessor to do, and such a guarantee as that, of necessity runs on throughout the duration of the lease. The lease was intended to be a guaranteed lease, and it is impossible to say that the guarantor could put an end to the guarantee at his pleasure, or that it could be put an end to by his death contrary to the manifest intention of the parties . . .

instances of the second class are more familiar. They are where the guaranty is given to secure the balance of a running account for goods from time to time, and it is reasonable to hold, unless the guarantee stipulates to the contrary, that the guarantor may at any time terminate the guarantee." See also *Balfour vs. Grace*, 2 Ch. 733 [1902].

⁹⁰ Gay vs. Ward, 67 Conn. 147; 34 Atl. 1025.

Contra—Michigan State Bank vs. Leavenworth Est., 28 Vt. 209.

Not only must the creditor have knowledge of the guarantor's death, but in order to have this work a revocation of the guaranty, he must have knowledge also of the fact that the deceased was a guarantor. *Clark vs. Thayer*, 105 Mass. 216.

though the contract stipulates that it shall continue until a written notice of revocation is received.⁹¹

⁹¹ Jordan v. Dobbins, 122 Mass. 168; Nat. Eagle Bank vs. Hunt, 16 R. I. 148; 13 Atl. 115.

Contra—Knotts vs. Butler, 10 Rich. Eq. (S. C.) 143; Pond vs. U. S. 111 Fed. 989; 49 C. C. A. 582.

The death of one of several joint obligors will not, however, operate as a revocation as to the surviving

obligors. Breckett vs. Addyman, 9 Q. B. Div. 783.

The obligation in this case was *joint* and *several*.

But see also Fennell vs. McGuire, 21 Up. Can. (C. P.) 134; where the obligation is joint and the same rule is applied.

CHAPTER IV.

SURETYSHIP DEFENSES

- Sec. 72. Material Alteration of Principal Contract.
- Sec. 73. Same Subject Continued.
- Sec. 74. Same Subject Continued.
- Sec. 75. Alteration of Principal Contract by the addition of new parties.
- Sec. 76. Alteration of Principal Contract by a change in the duties of the principal.
- Sec. 76a. Building Contracts.
- Sec. 76b. Building Contracts—Changes in the Manner of Payment.
- Sec. 77. Variation in amount of advancements under limited guaranty—Effect upon guarantor.
- Sec. 78. Change of parties.
- Sec. 79. Alterations beneficial to the surety or guarantor.
- Sec. 80. Alterations enlarging the principal liability.
- Sec. 81. Discharge of promisor by extension of time.
- Sec. 82. Agreement for extension must be for a consideration.
- Sec. 83. Payment of advance interest as a consideration for extension.
- Sec. 84. Agreement for extension must be for a definite time.
- Sec. 85. Extension of time by the execution and delivery of a note for the debt, payable at a later date.
- Sec. 86. Collateral securities maturing at a later date.
- Sec. 87. Extension of time by act of Legislature.
- Sec. 88. Giving time to Surety—Effect upon Co-Surety.
- Sec. 89. Giving time is not a defense, if the Surety is fully indemnified.
- Sec. 90. Extension of time as a defense to persons who are in the situation of a Surety.
- Sec. 91. Extension by appeal or continuance in judicial proceedings.
- Sec. 91a. Extension of time as a defense under Negotiable Instrument Codes.
- Sec. 92. Extension of time with reservation of rights against the Surety.
- Sec. 93. Agreements not to sue as distinguished from agreements to extend—Effect upon Surety.
- Sec. 94. Waiver of the defense of extension of time.
- Sec. 95. Delay of the Creditor in pursuing remedies against the Principal as a defense to the surety or guarantor.
- Sec. 96. Payment or other satisfaction as a discharge of the Surety or Guarantor.
- Sec. 97. Liability against Surety or Guarantor revived if payment or substituted surety is void.
- Sec. 98. Voluntary release of security held by the creditor or upon which the creditor has a lien.
- Sec. 99. Release of securities by the misconduct of the creditor.
- Sec. 100. Release of securities by operation of Law.
- Sec. 101. Release by the Creditor of Property of Principal in his possession or control, but not held as security for the Suretyship debt.
- Sec. 102. Whatever releases principal will release the surety or guarantor.
- Sec. 103. Same Subject—Release of principal by operation of law.
- Sec. 104. Same Subject—In cases where the release by operation of law is not the result of the fault or procurement of the Creditor.

- Sec. 105. Suretyship obligations obtained by fraud of the creditor.
- Sec. 106. Same Subject—Concealment or non-disclosure of facts by the Creditor.
- Sec. 107. Discharge of promisor by failure to disclose facts coming to the knowledge of the creditor, after the execution of the contract.
- Sec. 108. Fraud and Misconduct of the Principal.
- Sec. 109. Misconduct of the Principal, by delivering Suretyship obligations without complying with conditions.
- Sec. 110. Suretyship contracts made in reliance upon promises of the creditor.
- Sec. 111. Conditional contracts of Suretyship—Parol evidence not competent to show conditions.
- Sec. 112. Same Subject—Parol evidence competent in certain cases.
- Sec. 113. Release of promisor by the creditor.
- Sec. 114. Release of a Co-promisor by the creditor.
- Sec. 115. Defense of the promisor based upon the failure of the creditor to sue the principal when requested.
- Sec. 116. Same Subject—The doctrine of *Pain vs. Packard*.
- Sec. 117. The principal's right of set-off or counterclaim against the creditor as a defense to the promisor.
- Sec. 118. Defenses based upon the right of the promisor to control the application of collateral.
- Sec. 119. Revocation—Death of the promisor.

§72. Material alteration of principal contract.

A material alteration of a contract is such a change in the terms of the agreement as either imposes some new obligation on the party promising or takes away some obligation already imposed. A change in the form of the contract which does not effect one or the other of these results is immaterial, and will not discharge the surety.^a

Any change in the terms of the principal contract which obliges the debtor to do something which he was not before bound to do will discharge the surety or guarantor.¹ This is said to result from either one of two reasons:

^a *Rankin vs. Tygard*, 198 Fed. 795; 119 C. C. A. 591; *New Haven vs. National Steam Economizer Co.*, 79 Conn. 482; 65 Atl. 959; *Wilkinson vs. McKimmel*, 36 App. D. C. 336; *Mudd vs. Shroader*, 152 Ky. 696; 154 S. W. 21.

¹ *Boalt vs. Brown*, 13 O. S. 364; *Patterson vs. McNeely*, 16 O. S. 348; *Waterman vs. Vose*, 43 Me. 504; *McGrath vs. Clark*, 56 N. Y. 34; *Dewey vs. Reed*, 40 Barb. 16; *Hart vs. Clouser*, 30 Ind. 210; *Hesself vs. Johnson*, 63 Mich. 623; 30 N.

W. 209; *Hamm vs. Fagan*, 128 P. 141; 36 Okl. 223.

Under the Uniform Negotiable Instrument Codes what are material alterations and the effect thereof are controlled largely by the statute as adopted in each state, and the decisions thereunder, which are in a state of flux. A critical examination of the statutes and decisions in each state is recommended. See *ante*, (Secs. 7, 8, 9, 10, and notes, and *post*, Sec. 91a.

(1) It is an increase of the promisor's risk or hazard. The addition of new burdens upon the principal may be the cause of his failure to perform any part of his contract. The new conditions or terms might, indirectly at least, render impossible the carrying out of the things which were the subject of the guaranty.

(2) The contract as changed is not the same contract guaranteed by the promisor. The original contract has been put an end to and a new one substituted. The guarantor has never agreed to stand good for the latter, and suretyship cannot be imposed without the express consent of the promisor, and his execution of the original contract will not carry by implication any liability upon a substituted contract, although the latter is similar to the first.

Either one of these reasons is a satisfactory ground upon which to rest the discharge of the promisor, and both are abundantly supported by authority. The suggestion, however, that a new contract has been substituted entirely supersedes the first reason given. It is of no importance to consider whether the risk of the promisor has been increased or not, if the promisor is to be discharged for the reason that his contract has been ended.

§73. Same subject continued.

If the alteration consists in relieving the principal of some obligation included in the original contract, or if new obligations have been added and liabilities equal in amount cancelled, so that the new contract imposes no greater burdens or risk than the original, or if the added obligations can be shown to be merely nominal, and which do not in any way increase the risk of the promisor, then the question of the discharge of the promisor must rest wholly upon the proposition of a substituted contract, and many courts have been willing to stand solely upon this ground.

In an early English case H contracted for the milking of thirty cows for a year and J was surety. The parties to the principal contract changed the terms so that H was to have

twenty-eight cows for one part of the year and thirty-two for the other. This was apparently not a substantial change as the average of thirty remained, but the Court discharged the surety, holding: "The new agreement was binding only on those persons who were parties to it. If it had been intended to bind J by it, he should have been consulted; he had a right to insist upon a literal performance of the original bargain. If a new bargain was made, he had a right to exercise his judgment whether he would become a party to it. There may, perhaps, be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is, whether the contract performed by the plaintiff is the original contract to which the defendant was a party. If it is, then J is bound by it, otherwise he is not."²

² *Whitcher vs. James Hall*, 5 Barn. & Cr. 269 (1826).

"No principle of law is better settled at this day, than that the undertaking of the surety, being *stricti juris* he cannot, either at law or in equity, be bound farther or otherwise, than he is by the very terms of his contract. . . . He is not bound by the old contract, for that has been abrogated by the new; neither is he bound by the new contract, because he is no party to it. . . . Neither is it of any consequence that the alteration in the contract is trivial, nor even that it is for the advantage of the surety. *Non haec in foedera veni*, is an answer in the mouth of the surety, from which the obligee can never extricate his case, however innocently or by whatever kind intention to all parties, he may have been actuated." *Bethune vs. Dozier*, 10 Ga. 235.

This rule is somewhat modified in states where the distinction between the individual and the compensated corporate surety prevails. See *Young vs. American Bonding Co.*, 228 Pa. 373; 77 At. 623. *Stewart, J.* "The trend of all our modern decisions, federal and state, is to distinguish between individuals and corporate suretyship where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case the rule of *strictissimi juris* prevails, as it always has; with respect to the other, because it is

essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation of suretyship only where a departure from the contract is shown to be a *material variance*. . . . It follows that there is but one way by which it is to be determined whether the variance complained of was a material variance. The test is to be found in the answer to the question, whether it *substantially increased the chances of the loss insured against*. . . . It is not a question whether the variance actually caused the breach of the bond; but whether it was such a variance as a reasonably careful and prudent person undertaking the risk would have regarded as *substantially increasing the chances of loss*." *City of Philadelphia vs. Ray*, 266 Pa. 345; 109 Atl. 689. See also *post*, (Secs. 233, 234).

See also *Warden vs. Ryan*, 37 Mo. App. 466; *Atlanta National Bank vs. Douglass*, 51 Ga. 205; *Weir Plow Co. vs. Walmsley*, 110 Ind. 242; 11 N. E. 232; *Dey vs. Martin*, 78 Va. 1; *Christian & Gunn vs. Keen*, 80 Va. 369; *Rowan vs. Sharps' Rifle Mfg. Co.*, 33 Conn. 1; *Eyre vs. Hollier, Lloyd & Gould*, 250; *St. Louis Brewing Assn. vs. Hayes*, 71 Fed. Rep. 110; *Parke vs. White River Co.*, 110 Cal. 658; 43 Pac. 202; *Chester vs. Leonard*, 68 Conn. 495; 37 Atl. 397; *Plunkett vs. Sewing Machine Co.*, 84 Md. 529; 36 Atl. 115; *Prior vs. Kiso*, 81 Mo. 241; *Evans*

If the alteration consists in a change in the place of payment it adds an obligation to pay at a place not stipulated in the original agreement and relieves the principal from the obligation to pay at the place first stipulated. Generally this alteration would not in any way increase the risk or change the position of the principal, but the promisor in suretyship is not liable upon such substituted contract.³

The changing of the date of maturity, whether it hasten or delay the time of payment, is a material alteration,⁴ and on grounds of public policy a change of the date of commercial paper is a material alteration, even though the date as changed expresses the real agreement of the parties. To hold otherwise would operate against the unrestricted use of negotiable paper as a medium of commercial transactions. It is of the highest importance to preserve the integrity of written instruments, and one who has the custody of such instruments intended for his own benefit is bound to preserve them intact.⁵

vs. Graden, 125 Mo. 72; 28 S. W. 439; Gardner vs. Watson, 76 Tex. 25; 13 S. W. 39; Nichols vs. Palmer, 48 Wis. 110; 4 N. W. 137; Titus vs. Durkee, 12 Up. Can. (C. P.) 367.

It was held in Sanderson vs. Aston, L. R., 8 Ex. 73, that it is not sufficient to discharge the surety that the alteration be "material" merely in the sense that it imposes a new contract, but that the change must be prejudicial to the surety, and that an alteration in the principal contract, changing the period within which notice to quit employment could be given, from one month to three months, was not material since the risk of the surety was not thereby affected.

³ Pahlman vs. Taylor, 75 Ill. 629.

⁴ Wood vs. Steele, 6 Wall. 80, *Swayne, J.*: "The grounds of the discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. Its identity is changed: another is substituted without his consent; and by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds." Brannum Lumber Co. vs. Pickard, 71 N. E. 676; 33 Ind. App. 484.

⁵ Newman et al. vs. King, 54 O. S. 273; 43 N. E. 683.

In this case the payee changed the date, making the note read June 23rd, in place of June 22nd, the former being the date on which the note was written and signed and the date which the parties themselves intended the note should bear, and the alteration was to correct the mistake. The Court held: "Deliberate tampering with written instruments by their obligees upon any pretence whatever should not be encouraged."

"If the right to do so in respect to any material matter should be established the principle by which satisfactory limits can be fixed to such right are not apparent. . . Where, by mistake, a written instrument does not conform to the intention of the parties, and they can not agree respecting the mistake and its correction, an adequate remedy has been provided according to the principles of equity jurisprudence, by courts having jurisdiction to correct such mistakes where rules of evidence appropriate to establish the fact of mistake are prescribed and enforced."

But see Duker vs. Franz, 7 Bush, (Ky.) 273; McRaven vs. Crisler, 53 Miss. 542.

Pasting to the original contract a memorandum of an independent collateral agreement between the parties, which is intended to clarify one of the provisions in the contract does not discharge the sureties.^{5a}

§74. Same subject continued.

The same effect will be given to a material alteration of negotiable paper, although the alteration takes place before delivery of the paper to the payee, and before the paper has acquired any validity against the maker. The surety or guarantor not consenting to such change will be discharged.⁶

It is, however, urged that the execution of the suretyship contract and the intrusting of the contract to the principal for delivery to the creditor carries with it an implied authority to make such changes as will enable the principal to carry out the main purpose of the transaction⁷ and that in any event where the creditor makes his advancements without knowledge of the alteration the promisor should be estopped from claiming his discharge, since, as between two innocent parties, the one should bear the loss whose act made it possible for the other to be misled.

The rule which authorizes the holder of paper delivered to him in defective form or incomplete by reason of blanks left unfilled, should not be extended to that class of cases where the

^{5a} *United States Glass Co. vs. Mathews*, 89 Fed. 828. See also *Cambridge Savings Bank vs. Hyde*, 131 Mass. 77.

⁶ *Jones vs. Bangs*, 40 O. S. 139; *McGrath vs. Clark*, 56 N. Y. 34; *Draper vs. Wood*, 112 Mass. 315; *Bradley vs. Mann*, 37 Mich. 1; *Aetna Nat. Bank vs. Winchester*, 43 Conn. 391.

This is the rule even as against bona fide purchasers for value before maturity. *Hill vs. O'Neill*, 101 Ga. 832; 28 S. E. 996; *Simons & Co. vs. McDowell*, 125 Ga. 203; 53 S. E. 1031.

Contra—*Hackett vs. First National Bank of Louisville*, 114 Ky. 193; 70 S. W. 664; *Isnard vs. Torres & Marquez*, 10 La. Ann. 103.

But see *National Exchange Bank vs. Lester*, 194 N. Y. 461; 87 N. E. 779, where it is held that by virtue of the negotiable instruments code payment of a note which has been altered may be enforced by a bona fide holder according to its original tenor.

⁷ It is held that the delivery of a bond by the surety to the principal establishes the relations of agency between these parties, and the surety will be bound by any alteration made by the principal before delivery, not communicated to or known by the obligee, and that having thus held out the principal as his agent, the surety is estopped from claiming that he has exceeded his authority as such agent, as against one who

paper is not defective, but delivered with all the terms fully written in which are necessary to a completed contract. There is no room for the application of the rule of implied authority or estoppel in such cases.⁸

There is no difference in principle between cases of alteration by the debtor and alterations by the creditor. In either case, the discharge of the promisor may be based on the fact that a new contract has been substituted, or the risk increased, and it can make no difference to the promisor whose act caused this result. Only those alterations which are made by the

has relied upon his apparent authority, and that the surety should not be permitted to transfer the burdens resulting from misplaced confidence in his agents. *King County vs. Ferry*, 5 Wash. 536; 32 Pac. 538.

See also *Fowler vs. Allen*, 32 S. C. 229; 10 S. E. 947.

If the contract is delivered to the principal in an incomplete state leaving blanks to be filled in, the defense of alteration is shut out both on the ground of agency and estoppel, even though the principal fill in the blanks contrary to instructions. *White vs. Duggan*, 140 Mass. 18; 2 N. E. 110.

Where the instrument bears upon its face evidence that the principal is exceeding his authority as an agent, the surety may maintain his defense. *Fletcher vs. Anstin*, 11 Vt. 447; *Smith vs. United States*, 2 Wall. 219; *State vs. Craig*, 58 Iowa 238; 12 N. W. 301; *Hessell vs. Johnson*, 63 Mich. 623; 30 N. W. 209; *Allen vs. Marney*, 65 Ind. 399; *Ward vs. Churn*, 18 Gratt. 801; *McConnon & Co. vs. Evans*, 152 Ky. 491; 153 S. W. 773.

⁸ The rule stated in the text must be distinguished from those transactions in which the surety or guarantor signs upon conditions not communicated to the creditor. In such cases, estoppel is properly urged against the defense, for if fraud has been practiced by the principal, in delivering the contract contrary to instructions, and without disclosing to the creditor the limitations under

which the promisor signed, the one who made such deception possible by placing the contract in the hands of the principal, should suffer the loss, rather than the one who made the advancements relying upon the contract being what it purported to be. Such now seems to be the established rule in the United States. *State vs. Peck*, 53 Me. 284; *Fowler vs. Allen*, 32 S. C. 229; 10 S. E. 947; *Tidball vs. Hally*, 48 Cal. 610; *Alarks vs. First Nat. Bank*, 79 Ala. 550; *State vs. Potter*, 63 Mo. 212; *Dair vs. United States*, 16 Wall. 1; *Millett vs. Parker*, 2 Met. (Ky.) 608. *Post*, Sec. 108.

Contra—*People vs. Bostwick*, 32 N. Y. 445; *Hackett vs. First National Bank of Louisville*, 114 Ky. 193; 70 S. W. 664. "One who signs a note as surety in which are written the words 'five hundred' with spaces before and after them, which the maker fills up by writing 'twenty' before and 'fifty' after them, thereby making the note for \$2,550, is liable thereon to a bona fide purchaser." *Isnard vs. Torres & Marquez*, 10 La. Ann. 103.

The material alteration of a promissory note by a stranger is a mere spoliation of the instrument. Under the Uniform Negotiable Instruments Codes payment thereof may be enforced according to its original tenor. *National Exchange Bank vs. Lester*, 194 N. Y. 461; 87 N. E. 779, 21 L. R. A. (N.S.) 402n; 16 Ann. Cas. 770.

principal or creditor acting for themselves or through authorized representatives will operate to discharge the surety or guarantor. Any change or mutilation that is the result of accident or the act of a stranger will not effect the liability of the promisor.⁹

The question is somewhat mooted in this country whether the absence of fraudulent intent will render a material alteration ineffective when the holder asserts his claim upon the paper as if in its original form. Aside from the question of accident or mistake, it is difficult to find any distinction in principle between alterations made with intent to defraud and alterations made without such intent, provided in both cases there was an intent to change the contract.¹⁰ If the alteration is the result of mistake or accident a court of equity at the suit of the holder would undoubtedly reform the instrument.¹¹

⁹ Anderson vs. Belleuger, 87 Ala. 334; 6 South. 82; State vs. McGonigle, 101 Mo. 353; 13 S. W. 758; Murray vs. Graham, 29 Iowa, 520; Brooks vs. Allen, 62 Ind. 401.

¹⁰ In Crosswell vs. Labree, 81 Me. 44; 16 Atl. 331, the holder of the paper changed the contract, which was a note payable to order, by adding the words "or bearer" and the court, while holding the alteration material announced the view that such alteration was ineffective if made innocently without any intent to defraud, but that the burden of showing that the alteration was without intent to defraud was on the holder.

In Toomer vs. Rutland, 57 Ala. 379, the holder received a note with the place of payment left blank and filled in this blank by naming a bank as the place of payment. Held "The motive of the creditor in making the alteration may not be fraudulent—as in the present case, *mala fides* may not be imputable to him; yet, as the alteration changes the legal identity and effect of the instrument, the debtor may well say it is not the contract into which he entered, and he is not, therefore, bound by it, and that the identity and legal effect of the contract into which he did enter, has been voluntarily destroyed by the creditor."

See also Bigelow vs. Stilphen, 32 Vt. 521; Savings Bank vs. Shaffer,

9 Neb. 1; 1 N. W. 980; Taylor vs. Taylor, 12 Lea (Tenn.), 714; Newman vs. King, 54 O. S. 273; 43 N. E. 683.

In Booth vs. Powers, 56 N. Y. 22, the question of fraudulent intent is held of no moment in determining the effect of the alteration on the validity of the instrument. But if the holder can show that the alteration was made innocently to correct a mistake or to conform to the real intent of the parties, he may resort to an action upon the original debt providing the execution of the note did not extinguish the debt; whereas, if the alteration was fraudulently made the holder forfeits the debt altogether.

To the same effect, see Clough vs. Seay, 49 Iowa 111; Clute vs. Small, 17 Wend. 238; Matteson vs. Ellsworth, 33 Wis. 488; Hunt vs. Gray, 35 N. J. L. 227.

Of course, the promisor in suretyship is not in any way affected by this modification, giving the creditor a right of action against the principal on the original debt where the alterations were innocently made.

The liability against the promisor is inseparably connected with the written instrument, which is vitiated by the alteration discharging the promisor.

¹¹ Chadwick vs. Eastman, 53 Me. 16.

Such a procedure is more in accord with the policy of our law than for the holder to make the alteration and then rely upon the court to ratify his act when an action is brought. An immaterial alteration, although made with fraudulent intent, may be disregarded.¹²

§ 75. Alteration of principal contract by the addition of new parties.

The addition of a new party as principal maker is a material alteration of the principal contract and the promisor not consenting is discharged. This is but a direct and simple application of the rule that the promisor is not liable in a substituted contract. The addition of a new name as maker might change a several contract to a joint and several, but whether the added party resulted in this or some other change in the contract, the instrument would operate differently in respect to all the parties from the moment the name was added, and circumstances might even be conceived which would make the addition of a new party prejudicial to the surety or guarantor; generally, however, such alteration would be beneficial to the promisor.

The decided weight of authority is that the addition of a new party constitutes such material alteration as will discharge the surety or guarantor.¹³

¹² Moye vs. Herndon, 30 Miss. 110.

Contra—Heard vs. Tappan & Merrett, 121 Ga. 437; 49 S. E. 263.

¹³ Wallace vs. Jewell, 21 O. S. 163; Chadwick vs. Eastman, 53 Me. 12; Shipp's Adm. vs. Suggett's Adm., 9 B. Mon. 5; Hall's Admx. vs. McHenry, 19 Iowa 521; Hamilton vs. Hooper, 46 Iowa 516; Gardiner vs. Walsh, 5 El. & Bl. 83; Soaps vs. Eichberg, 42 Ill. App. 375; Keller vs. Rock Island State Bank, 292 Ill. 553; 127 N. E. 94; Brown vs. Johnson Bros., 127 Ala. 292; 28 So. 579; Rankin vs. Tygard, 198 Fed. 795; Swank vs. Kaufman, 255 Pa. 316; 99 Atl. 1000; L. R. A. 1917D, 826; Bank of Commerce vs. Webster (Okla.), 172 Pac. 942; L. R. A. 1918F, 696, and note at page 698, "Adding of another party to negotiable instrument after its execution and delivery as a material alteration."

In Brownell vs. Winnie, 29 N. Y. 400, it was held that the addition of a new name as maker upon a note upon which there is but one

maker does not change in any way the obligation or relations of the original maker, and that he still remains severally liable for the entire debt and hence as to him this is not a material alteration.

The distinction, however, between this case and the case where a new party is added to a joint and several note is not apparent, for if the original parties sustain no contractual relations with the new parties in the one case they would not in the other. In either case, the new party is either (a) liable with the original parties as joint makers, or (b) liable for their debt as guarantors. Under the first supposition contractual relations are established which did not before exist, and which justify the application of the rule for the discharge of the surety, if the question of increase of risk is to be left out of consideration.

Under the second supposition, the original makers remain liable for the entire amount without changing

Yet there is respectable authority that the addition of a new party as surety or guarantor is not a change of the principal contract. The undertaking of the new surety is merely collateral to the main contract and not incorporated into it and the principal remains in exactly the same relation to the creditor as before.¹⁴

The erasure by the obligee of a surety's name on a bond releases all sureties who sign after the surety whose name was erased and before the erasure.^{14a}

§ 76. Alteration of principal contract by a change in the duties of the principal.

A surety upon a contract of employment, or upon a bond for the faithful performance of duty in a position of trust, or to secure the performance of any specified duty by the principal,

in any respect their relations to the creditors by reason of the existence of the new collateral contract of suretyship, and these results would seem to be unaffected by the fact as to whether the main contract was executed by a sole maker or by joint makers.

¹⁴ *Mersman vs. Werges*, 112 U. S. 139; 5 S. Ct. 65; *McCaughy vs. Smith*, 27 N. Y. 39; *Miller vs. Finley*, 26 Mich. 249; *Stone vs. White*, 8 Gray 589; *State vs. Dunn*, 11 La. An. 549; *Ex Parte Yates*, 2 DeG. & J. 191; *Standard Underground Cable Co. vs. Stone*, 54 N. Y. S. 383; *Holthouse vs. State*, 97 N. E. 130; 149 Ind. App. 178; *Barnes vs. McKernan*, 31 Neb. 165; *Taylor vs. Acom* (Ind. Ter.), 45 S. W. 130; *Rudolph vs. Brewer*, 96 Ala. 189; 11 So. 314.

Contra—*Berryman vs. Manker*, 56 Iowa 150; 9 N. W. 103; *Bank of Limestone Bank vs. Penick*, 2 T. B. Mon. (Ky.) 98; *M. Rumley Co. vs. Wilcher & Co.*, 23 Ky. Law Rep. 1745; 66 S. W. 7; *State vs. Paxton*, 65 Neb. 110; 90 N. W. 983; *Fry vs. Bannom Sewer Pipe Co.*, 101 N. E. 10; 170 N. E. 309; *Brown vs. Johnson*, 127 Ala. 292; 28 So. 579; *First Nat. Bank vs. Weidenbeck*, 87 Fed. 271.

Some distinction seems to be made where the additional surety signs before delivery of the instrument, and while it is in the hands of the principal. The original surety is held to be estopped from claiming his discharge because he intrusted

the instrument to the principal, thereby giving him implied authority to get additional parties if the same became necessary. *Keith vs. Goodwin*, 31 Vt. 208.

The further reason is sometimes urged that if the new signature is made before delivery to the payee it does not amount to an alteration because until after delivery there is no contract. *Ward vs. Hackett*, 30 Minn. 150; 14 N. W. 578; *Graham vs. Rush*, 73 Iowa 451, 35 N. W. 518.

Section 124 of the Uniform Negotiable Instruments Act provides: "When an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment according to its original tenor." Sec. 125, *Id.*, provides *inter alia* that "Any alteration which changes the number or relations of the parties is a material alteration." As respects negotiable instruments these sections seem to have codified the law on the subject, although there is a great conflict of authority upon these questions. In Ohio these sections are held to apply only to the physical alteration of a negotiable instrument. *Richards vs. Market Exchange Bank Co.*, 81 O. S. 348; 90 N. E. 1000; 26 L. R. A. (N.S.) 99.

^{14a} *Hillibee vs. Warner*, 118 N. W. 1047; 17 N. D. 594.

But see *Hess vs. Schnaffner*, 139 S. W. 1024.

will not be bound for any default under a modified form of such contract.^{14b}

If the parties to the main contract by agreement substitute other duties for the principal, although the general character of the employment is not changed, the sureties can not be held for a breach of these added duties.

Where the contract between employer and employe requires the employe to render reports of business done each week, a waiver by the employer of the weekly settlements will discharge the sureties on the bond of the employe.^{14c}

Thus a surety upon the bond of a bookkeeper in a bank will not be liable for defaults committed by the principal when promoted to the position of receiving teller.¹⁵

Again, where a lease provided that the premises shall be given up at the end of the term in the same condition as when received. The guarantor was held to be discharged by a contemporaneous agreement between the lessee and lessor that the latter should remodel the building before taking possession.¹⁶

A guaranty of a contract of sale of merchandise upon a credit of six months will not hold good for a sale made on credit of less or more than six months.¹⁷

^{14b} Pott & Co. vs. Schmucker, 84 Md. 535; 36 Atl. 592; Orleans & J. Ry. Co. vs. International Const. Co., 113 La. 409; 37 So. 10; Despres vs. Folz, 134 Ill. App. 111; Cudahy Packing Co. vs. Shepard, 37 Tex. Civ. App. 1; 82 S. W. 786; Kirschbaum & Co. vs. Blair, 98 Va. 35; 34 S. E. 895; City of New York vs. Clark, 82 N. Y. S. 855; Chandler Lumber Co. vs. Radke, 136 Wis. 495; 118 N. W. 185; Germania Fire Ins. Co. vs. Lange, 193 Mass. 67; 78 N. E. 746.

^{14c} Singer Mfg. Co. vs. Boyette, 74 Ark. 600; 86 S. W. 673; Morrison vs. Arons, 65 Minn. 321; 68 N. W. 33; Fidelity Mutual Life Assoc. vs. Dewey, 83 Minn. 389; 86 N. W. 429.

Where the requirements changed were not such as were essential ingredients in the contract of surety, the surety is not released. Amicable, etc., Ins. Co. vs. Sedgwick, 110 Mass. 163; Harper vs. National Life Ins. Co., 56 Fed. 281; Hartford Fire Ins. Co. vs. Casey, 196 Mo. App. 291, 298; 191 S. W. 1072.

¹⁵ National Mechanics Banking Assn. vs. Conkling, 90 N. Y. 116; Kellogg vs. Scott, 58 N. J. Eq. 344; 44 Atl. 190.

But see Hibernia Savings Bank vs. McGinnis, 9 Mo. App. 578, where it was held that "where a bank teller is made cashier, that he continues to act as teller does not increase the risk of the sureties on his bond as cashier, and will not discharge them."

¹⁶ Farrar vs. Kramer, 5 Mo. App. 167. See also Green vs. Boyd, 13 Pa. Sup. Ct. 651.

¹⁷ Leeds vs. Dunn, 10 N. Y. 469; Henderson vs. Marvin, 31 Barb. 297; Stewart vs. Ranney, 26 How. Pr. 279; 68 O. S. 407; 67 N. E. 719.

A change in the character of the merchandise guarantied will discharge the guarantor.¹⁸

An alteration of the principal contract without the consent of the surety discharges the surety only for defaults arising after the alteration or change is made.^{18a}

Where new duties are given public officers by subsequent legislation the sureties upon the bond of the officer have been held to be discharged.¹⁹

The fact that a portion of an order of goods proved defective in quality and was returned by the purchaser without the consent of a guarantor will not operate as a change in the contract of purchase so as to relieve the guarantor of his obligation to pay for that which was received in good order.^{19a}

§76a. Building contracts.

The rule that an alteration of the principal contract releases the surety has been relaxed in the case of building contracts by the application of a construction peculiar to contracts of insurance.²⁰

¹⁸ Grant vs. Smith, 46 N. Y. 93. The guarantied contract was for a steam engine and two boilers and it was modified so as to require the delivery of an engine and three boilers.

In Evans vs. Lawton, 34 Fed. Rep. 233, a contract of agency provided that the agent was to sell only for cash. Evidence that the employer had knowledge of the fact that the agent was selling on credit, and in some cases consented to it, was held to be a material alteration which discharged the guarantor.

But see Fond du Lac Harrow Co. vs. Bowles, 54 Wis. 425; 11 N. W. 795, where it is held that an enlargement of the territory in which the agent was permitted to sell was

not such a material alteration as would discharge the surety upon the agent's bond.

Contra—Good Roads Machinery Co. vs. Moore, 58 N. E. 540; 25 Ind. App. 479.

^{18a} Lake vs. Thomas, 84 Md. 608; 36 Atl. 437; White River, L. & W. R. R. vs. Star R. & L. Co., 77 Ark. 128; 88 S. W. 825.

¹⁹ Miller vs. Stewart, 9 Wheat. 680; Denio vs. State, 60 Miss. 949; Bensinger vs. Wren, 100 Pa. 500; State of Missouri vs. Holman, 96 Mo. App. 193; 68 S. W. 965.

^{19a} Groendyke vs. Musgrave, 123 Iowa 535; 99 N. W. 130.

²⁰ Geo. A. Hormel & Co. vs. American Bonding Co., 112 Minn. 288; 128 N. W. 12; Brandrup vs. Brazier,

If alterations are slight and trivial, the surety will not be released, even though not consenting, such changes being deemed incident to any building operation and contemplated by the parties,^{20a} and by extension of this principle, changes which involve no prejudice or loss to the surety do not release the non-consenting surety. Thus where the owner agreed to insure the building under construction for the benefit of himself and the contractor, as their interest might appear, and without the knowledge or consent of the surety, placed the insurance for the benefit of a mortgagee, it was held, no fire having occurred, that the surety was not released.^{20b}

So also, where there has been a change of location of the building from one lot to another, and not involving additional expense to the contractor.^{20c}

These relaxations of the rule are, however, limited to those cases in which the surety company is compensated and engaged in the business of suretyship. This distinction has been stated thus:

"The rule that where changes in a building contract made without the consent of the surety of the contractor affect the identity of the contract, the surety is discharged, though the changes do not increase the risk of the surety, does not apply where the surety is engaged in the business for hire, and in

111 Minn. 376; 127 N. W. 424; Young vs. American Bonding Co., 228 Pa. 373.

^{20a} Hohn vs. Shideler, 164 Ind. 242; 72 N. E. 575; Kunzweiler vs. Lehman, 70 N. Y. S. 290; Stephens vs. Elver, 101 Wis. 392; 77 N. W. 737; Fullerton Lumber Co. vs. Gates, 89 Mo. App. 201; Cooke vs. White Com. School Dist., 33 Ky. Law Rep. 926; Fransioli vs. Thompson, 55 Wash. 259; 104 P. 278; Hinton vs. Stanton, 165 S. W. 299.

^{20b} Hohn vs. Shideler, 164 Ind. 242; 72 N. E. 575; Schreiber vs. Worm, 164 Ind. 7; 72 N. E. 852; Chicago vs. Agnew, 264 Ill. 288.

The strict rule as to release of surety by the acts of the indemnitee applies only to voluntary sureties and not to paid sureties. Equitable Surety Co. vs. Bank of Hazen, 121 Ark. 630; 181 S. W. 279, 1200; Pond Creek Coal Co. vs. Citizens'

Trust, etc., Co., 170 Ky. 601; 186 S. W. 494; Ladies of Maccabees vs. Illinois Surety Co., 196 Mich. 27; 163 N. W. 7.

A surety for profit may not demand a release for every variance in terms or performance of the principal contract, Hileman & Gint vs. Faus, 176 Iowa 644; 158 N. W. 597, but it may insist upon compliance with the clearly expressed requirements, which are made the condition of liability.

^{20c} Segari vs. Mazzei, 116 La. 1026; 41 Southern 245. See also Kunzweiler vs. Lehman, 70 N. Y. S. 290; Fergus Falls vs. Illinois Surety Co., 112 Minn. 462; 128 N. W. 820; Brandup vs. Brazier, 111 Minn. 376; 127 N. W. 424; Fransioli vs. Thompson, 55 Wash. 259; 104 P. 278; Prescott National Bank vs. Head, 11 Ariz. 213; 90 P. 328.

such case mere immaterial variations, or unsubstantial deviations which do not prejudice the right of the surety, do not discharge it." ^{20d}

The weight of authority supports the view that any change in the principal contract discharges the surety, whether the risk is increased or not. ^{20e}

If the builder's contract provides that changes may be made in the plans and specifications, the surety is held to have consented in advance to such alterations; ^{20f} this assent by the surety is applied, however, only as to minor changes and do not include changes which greatly enlarge the responsibility of the contract.

^{20d} *Rule vs. Anderson*, 160 Mo. App. 347; 142 S. W. 358. See also *Boppart vs. Surety Co.*, 140 Mo. App. 675; 126 S. W. 768; *Long vs. American Surety Co.*, 23 N. D. 492; 137 N. W. 41; *James Black Masonry & Contracting Co. vs. National Surety Co.*, 61 Wash. 471; 112 P. 517.

^{20e} *Beers vs. Wolf*, 116 Mo. 179; 22 S. W. 620; *O'Neal vs. Kelley*, 65 Ark. 550; 47 S. W. 409; *Alcatraz Masonic Assn. vs. U. S. F. & G. Co.*, 3 Cal. App. 338; 85 P. 156; *Fulleton Lumber Co. vs. Gates*, 89 Mo. App. 201; *Bagwell vs. American Surety Co.*, 102 Mo. App. 707; 77 S. W. 327; *Cowdery vs. Hahn*, 105 Wis. 455; 81 N. W. 882; *Reissans vs. Whites*, 128 Mo. App. 135; 106 S. W. 603; *Luling Oil & Mfg. Co. vs. Gohmert*, 50 Tex. Civ. App. 606; 110 S. W. 772; *Utterson vs. Elmore*, 154 Mo. App. 646; *Trustees of 7th Baptist Church vs. Andrew & Thomas*, 115 Md. 535; 81 Atl. 1; *Woodruff vs. Schultz*, 155 Mich. 11; 118 N. W. 579; *Haigler vs. Adams*, 5 Ga. App. 637; 63 S. E. 715; *Wolf*

vs. Aetna Indemnity Co., 163 Cal. 597; 126 P. 470; *United States vs. Freel*, 186 U. S. 309; *Ziegler vs. Hallahan*, 131 Fed. 210.

But see *Guaranty Co. vs. Pressed Brick Co.*, 191 U. S. 416.

In *Hubbard vs. Reilly*, 51 Ind. App. 19; 98 N. E. 886, the Court said the change in the contract would discharge the surety, even though it was beneficial to the surety.

^{20f} *Drumheller vs. American Surety Co.*, 30 Wash. 530; 71 P. 25; *Daly vs. Busk Tunnel Ry. Co.*, 129 Fed. 513; *United States vs. Walsh*, 115 Fed. 697; *Hedrick vs. Robbins*, 30 Ind. App. 595; 66 N. E. 704; *Lumber Co. vs. National Surety Co.*, 124 Ia. 617; 100 N. W. 556; *McLennan vs. Wellington*, 48 Kas. 756; 30 P. 183; *Hayden vs. Cook*, 34 Neb. 670; 52 N. W. 565; *Lumber Co. vs. Gillard*, 136 Cal. 55; 68 P. 576; *Enterprise Hotel Co. vs. Book*, 48 Ore. 58; 85 P. 333; *Blauvelt vs. Kemon*, 196 Pa. 128; 46 Atl. 416;

Thus where the contract was for a one-story building, and the plans were changed to a two-story building, it was held that the surety was released.^{20*g*}

Alterations made solely for the benefit of the owner and not affecting the risk of the surety may generally be made without the consent of the surety.^{20*h*}

If on default of the contractor the owner takes over the work and completes it, the surety can not be held for the cost of completion in a case where the owner makes a substantially different contract for the completion.^{20*i*}

Changes made in the principal contract will not release the surety from liability to materialmen and labor where the bond is given for their benefit, even though the changes are of such a character as to release the surety as against the owner.^{20*j*}

Phila. vs. Stewart, 201 Pa. 526; 51 Atl. 348; Cowles vs. U. S. F. & G. Co., 32 Wash. 120; 72 P. 1032; Kretschmar vs. Bruss, 108 Wis. 396; 84 N. W. 429; American Surety Co. vs. San Antonio Trust Co., 98 S. W. 387; Fidelity & Deposit Co. vs. Robertson, 136 Ala. 379; 34 Southern 933; McMullen vs. United States, 222 U. S. 460; American Surety Co. vs. Scott, 18 Okl. 264; 90 P. 7; Bartlett & Kling vs. Ill. Surety Co., 142 Iowa 538; 119 N. W. 729.

^{20*g*} Miller-Jones Furniture Co. vs. Fort Smith Ice Co., 6 Ark. 287; 50 S. W. 508. See also Barrett-Hicks Co. vs. Glas, 9 Cal. App. 491; 99 P. 856; Swasey vs. Doyle, 88 Mo. App. 536; Burns vs. Fidelity & Deposit Co., 96 Mo. App. 467; 70 S. W. 518; McConnell vs. Poor, 113 Ia. 133; 84 N. W. 968; Erfurth vs. Stevenson, 71 Ark. 199; 72 S. W. 49; House vs. Surety Co., 21 Tex. Civ. App. 590; 54 S. W. 303.

^{20*h*} American Surety Co. vs. San Antonio Trust Co., 98 S. W. 387.

^{20*i*} U. S. F. & G. Co. vs. United States, 194 Fed. 611.

^{20*j*} United States ex rel. Anniston Pipe & Fdy. Co. vs. National Surety Co., 92 Fed. 549.

In the case last cited the Court said: "The bond from a contractor for public work is intended to perform a double function; first, to secure to the Government the faithful performance of the contract, and second, to protect third persons from whom the contractor may obtain labor or materials in the prosecution of work. In its second aspect the bond, by virtue of the statute, contains a separate and distinct agreement between the obligors and such third persons as to which the agency of the Government ceases when the bond is given and approved and subsequent changes in the contract or specifications agreed upon between the government and the

§76b. Building contracts—changes in the manner of payment.

The stipulations in a building contract, that the owner will make payments as the work progresses, in accordance with certificates of the architect, but will retain a certain percentage of the amount earned, until the work is completed, are by the weight of authority considered to be covenants for the benefit of the surety, and a violation of these stipulations by premature payments deemed a material alteration of the contract, whereby the surety is released.

“The rule rests upon two reasons—the one is that such a defense deprives the surety of the security which the owner or principal contractor has agreed to hold for his benefit, and the loss of the inducement which otherwise would have operated on the contractor’s mind, to induce him to finish the work in accordance with the terms of his obligation.” ^{20*k*}

It has been held, however, that the condition in respect to premature payments is for the benefit of the owner only and

contractor, though without the knowledge or consent of a surety, where the general nature of the work and materials remains the same, will not release the surety from liability to persons who supply labor or materials thereunder.”

Chaffee vs. U. S. F. & G. Co., 128¹ Fed. 918; Dewey vs. State, 91 Ind. 173; Conn vs. State, 125 Ind. 514; 25 N. E. 443; United States ex rel. Snyder vs. Hazard, 53 App. Div. 410; Kaufman vs. Cooper, 46 Neb. 644; 65 N. W. 796; King vs. Murphy, 49 Neb. 670; 68 N. W. 1029; Lumber Co. vs. Peterson, 124 Ia. 550; 100 N. W. 550; U. S. F. & G. Co. vs. Omaha Building & Construction Co., 116 Fed. 145; U. S. F. & G. Co. vs. American Blower Co., 41 Ind. App. 620; 84 N. E. 555.

^{20*k*} Jas. Black Masonry & Construction Co. vs. National Surety Co., 61 Wash. 471; 112 P. 517; County of Glenn vs. Jones, 146 Cal. 518; 80 P. 695; First National Bank vs. Fidelity & Deposit Co., 145 Ala. 335; 40 Southern 415; Calvert vs. London Dock Co., 2 Keen (Eng. Chanc.) 639; Fidelity & Deposit Co. vs. Agnew, 152 Fed. 955; O’Neill vs. Title Guaranty & Trust Co., 191 Fed. 570; Long vs. American Surety Co., 23 N. D. 492; 137 N. W. 41; McKnight vs. Lange Mfg. Co., 155 S. W. 977; Kunz vs. Boll, 140 Wis. 69; 121 N. W. 601; Village of Chester vs. Leonard, 68 Conn. 495; 37 Atl. 397; Queal & Co. vs. Stradley, 117 Ia. 748; 90 N. W. 588; McNally vs. Mercantile Trust Co., 204 Pa. 596; 54 Atl. 360.

that the condition may be waived by the owner without releasing the surety.²⁰¹

In other cases it is held that the surety is discharged merely to the extent that he has been prejudiced by the change in the manner of payment.^{20m}

Where the building contract provided that bills for labor and materials should be paid directly to the persons holding the claims, and the owner paid the contractor, it was held that the surety was discharged.²⁰ⁿ

Where the form of certificate to be used by the architect is not fixed by the contract, a statement to the effect that a certain sum is now due will justify payment by the owner.^{20o}

A loan by the owner to the contractor, with an agreement that the owner might apply toward the payment of the loan the sums thereafter to become due under the contract is held to be an independent transaction, and not a payment, and so not in violation of the terms of the building contract as to time of payment, and therefore not release the surety.^{20p}

²⁰¹ Fidelity & Deposit Co. vs. Robertson, 136 Ala. 379; 34 Southern 933; First Presbyterian Church vs. Housel, 115 Ill. App. 230; Eureka Stone Co. vs. First Christian Church, 86 Ark. 212; 110 S. W. 1042; City of New Haven vs. National Steam Economizer, 79 Conn. 482; 65 Atl. 959; McKenzie vs. Barrett, 43 Tex. Civ. App. 451; 98 S. W. 229.

But see First National Bank vs. Fidelity & Deposit Co., 145 Ala. 335; 40 Southern 415.

^{20m} Smith vs. McKesson, 148 N. Y. 241; 42 N. E. 639; Hand Mfg. Co. vs. Marks, 36 Oreg. 323; 50 P. 549; Wehrung vs. Denham, 42 Oreg. 386; 71 P. 133; Leghorn vs. Nydell, 39 Wash. 17; 80 P. 833; Mayes vs. Lane, 116 Ky. 366; 76 S. W. 399; Bateman Bros. vs. Mapel, 145 Cal. 241; 78 P. 734.

But see Gleim vs. Jones, 146 Cal. 518; 80 P. 695; Monro vs. National Surety Co., 47 Wash. 488; 92 P. 290; Marree vs. Ingle, 69 Ark. 126; 61 S. W. 369.

²⁰ⁿ Guthrie vs. Carpenter, 162 Ind. 417; 70 N. E. 486; Tinsley vs. Kemery, 111 Mo. App. 87; 84 S. W. 993.

^{20o} Snaith vs. Smith, 27 N. Y. S. 379; Wyckoff vs. Meyers, 44 N. Y. 143; Finney vs. Condon, 86 Ill. 80; Lumber Co. vs. Peterson, 124 Ia. 599; 100 N. W. 550.

^{20p} Museum of Fine Arts vs. American Bonding Co., 211 Mass. 124; St. John's College vs. Aetna Indemnity Co., 201 N. Y. 335; 94 N. E. 994; Bateman Bros. vs. Mapel, 145 Cal. 241; 78 P. 734; Fidelity & Deposit Co. vs. Agnew, 152 Fed. 955.

§77. Variation in amount of advancements under limited guaranty—Effect upon guarantor.

Where a valid contract subsists obligating the creditor to make advances to a definite amount any alteration of this contract reducing or enlarging the amount to be advanced will discharge the guarantor.²¹

This is a distinct substitution of a new contract; furthermore, an increase or a decrease of the stipulated amount might be a detriment to the principal, and unless the promisor assents to this change he ought not to be bound.

Some confusion arises by failing to distinguish between cases where the subject of the guaranty is a subsisting and binding contract between the principal and creditor to make certain advances, and when the transaction is merely a proposal to guarantee optional advances up to a certain amount.

In the latter case the guarantor will be liable for such advances as are made relying upon his guaranty whether the amount be equal to or less than the sum named in the letter of credit, and his liability within the limit named will be unaffected by the fact that the creditor may have advanced a greater sum.²²

The mere failure of the parties to perform the contract, such as a refusal by the principal to receive all the advancements agreed upon, will not amount to an alteration of the contract. Thus, where the guaranty was for £400 upon condition that credit should be extended for that amount. The principal bought goods only to the extent of £300. The guarantor when

²¹ Ryan vs. Shawneetown, 14 Ill. 20; Watriss vs. Pierce, 32 N. H. 560.

In Johnston vs. May, 78 Ind. 293, the amount due on a promissory note was changed by the endorsement of a credit due in another transaction; this was held to be a material alteration and that the surety was discharged.

But see Bank of New Zealand vs. Wilson, 5 N. Z. L. R. S. C. 215, where the advancements were in excess of the limit of the guaranty, held not to invalidate the guaranty.

²² Clagett vs. Salmon, 5 Gill & Johns. (Md.) 314; Sheppard vs. Daniel Miller Co., 7 Ga. App. 760; 68 S. E. 451.

sued claimed his discharge on the ground that credit had not been extended to the amount stipulated. This was held, however, not to be an alteration of the contract, and that a failure to perform the contract by the principal should not prejudice the creditor.²³

Restrictive conditions in the contract of guaranty must be complied with or the guarantor will be discharged. When the guaranty is upon condition that the creditor make advancements not exceeding a certain amount, credit in excess of this amount will wholly discharge the guarantor.²⁴

§78. Change of parties.

If the contractual relation of principal and creditor are changed by the substitution of new parties in place of those originally contracting, either by the original party assigning his interest in the contract to another in whole or in part, or by associating new parties by partnership agreements, the surety or guarantor will be discharged. Thus, A contracts to sell merchandise to B and C guarantees the payment. If A assigns his contract to another the guarantor will not be liable to the assignee for the purchaser's default, neither will the guarantor be liable for the default of one to whom B should assign his contract of purchase. In both cases the guarantor is

²³ Lindsay vs. Parkinson, 5 Irish Law Rep. 124.

A breach of the contract by the creditor will discharge the surety; while this is not strictly an alteration of the contract, yet the effect upon the surety is the same, and if the beneficiary of the suretyship fail to keep his engagement he should be estopped from charging the surety with default.

Watts vs. Shuttleworth, 5 Hurl. & Nor. 235. In this case, the cred-

itor failed to keep the property insured which was subject to the contract. The surety was held wholly discharged and not merely to the extent of his loss by reason of the omission to insure.

See also Pioneer Co. vs. Freeburg, 59 Minn. 230; 61 N. W. 25; Carson Assn. vs. Miller, 16 Nev. 327.

²⁴ Bloomington Min. Co. vs. Searles, 63 N. J. L. 47; 42 Atl. 840; Kimball vs. Baker, 62 Wis. 526; 22 N. W. 730.

discharged for the same reason, namely, because there is an alteration of the principal contract by the substitution of new names. In neither case has the guarantor agreed to assume suretyship relations with these new parties. The rule that a special suretyship contract can not be assigned rests upon the proposition that such assignment would be a material alteration,²⁵ and the same reason will discharge the surety where the contractual position of the parties to the main contract is changed by the formation or dissolution of partnership relations on the part of either party to the contract.²⁶

§79. Alterations beneficial to the surety or guarantor.

The claim is frequently urged that the general rule whereby the promisor is discharged by the alteration of the main contract without his assent, should yield in those cases where the changes are beneficial to the surety or guarantor. That to insist upon its application in such cases is a mere technicality without any equity in its favor and not within the spirit of the adjudicated rules in suretyship.²⁷

²⁵ Ante Sec. 52. The rule stated in the text can not apply where the suretyship is upon a negotiable instrument executed in anticipation of advancements by a particular creditor. Such creditor may assign his contract interest in the note, and the surety or guarantor upon the paper will be liable to the substituted party for the advancements. *Lyman vs. Sherwood*, 20 Vt. 42; *Cross vs. Rowe*, 22 N. H. 77.

A promisor in suretyship, however, has the undoubted right to select his own creditor, and to insist that there be no change of creditors without his assent in all cases except where the rules of negotiability protect parties who make advances in good faith. Notice to the party making advances that he is not the one to whom the surety expected to be bound will prevent recovery against the surety. *Russell vs. Ballard*, 16 B. Mon. (Ky.) 201; *Prescott vs. Brinsley*, 6 Cush. 233; *Clinton Bank vs. Ayres*, 16 O. 283; *Knox Co. Bank*

vs. Lloyd's Admrs., 18 O. S. 353; *Manufacturers' Bank vs. Cole*, 39 Me. 188.

See also *Greenville vs. Ormand*, 51 S. C. 58; 28 S. E. 50. In this case the original payee declined to discount the note and indorsed it to another without recourse. The surety was held to be discharged.

Byers vs. Hickman Grain Co., 112 Iowa 451; 84 N. W. 500; *Mathews vs. Garman*, 110 Mich. 559; 68 N. W. 243; *Friendly vs. National Surety Co.*, 89 P. 177; 46 Wash. 71; *School Dist. No. 6 vs. Smith*, 127 P. 797; 63 Or. 586.

But see *The Springfield Light Co. vs. Hobart*, 98 Mo. App. 227; 68 S. W. 942.

²⁶ Ante Secs. 53, 54.

²⁷ *Cambridge Savings Bank vs. Hyde*, 131 Mass. 77.

Morton, J.: "The surety is discharged because the act of the creditor is injurious to him and is inconsistent with the duty which the creditor owes to him.

This view has been generally rejected upon the ground that a surety should not be compelled to adopt contracts merely because they can be shown to be beneficial to him, and upon the ground of public policy which requires that the integrity of written instruments be preserved, and that the one for whose benefit such instruments are intended, and who has the custody of them, must be charged in strictness with their preservation.²⁸

Where the act of which the surety complains is a new agreement changing some of the terms of the original agreement, we think the true rule is, that, if such new agreement is or may be injurious to the surety, or if it amounts to a substitution of the new agreement for the old, so as to discharge and put an end to the latter, the surety is discharged. But if the change in the original contract from its nature is beneficial to the surety, or if it is self-evident that it cannot prejudice him, the surety is not discharged."

In this case, the rate of interest was reduced from $7\frac{1}{2}$ to $6\frac{1}{2}$ per cent. by a stipulation written on the back of the note. Some distinction seems to be made in this case and others between alterations in the language of the original contract, and the agreements to change which are disconnected from the original contract, leaving the language of the latter intact. *Wilkinson vs. McKimmie*, 36 App. D. C. 336; *Ganey vs. Hohlman*, 145 Ill. App. 467; *New York Life Ins. Co. vs. Casey*, 178 N. Y. 381, 391; 70 N. E. 916, 919. See also *Ullman Realty Co. vs. Holander*, 123 N. Y. S. 772. The court said: "While it is unquestionably the law in this state, where a contract is altered or changed, that the surety is discharged, and that the courts will not make inquiry to ascertain if the change be to his benefit or his injury, still I am of the opinion that the doctrine as laid down in the Massachusetts case (*Cambridge Savings Bank vs. Hyde*, supra), is the logical, rational and proper one, and should be applied in this state to cases where, if without inquiry it is self-evident and upon a mere statement of the fact, that benefit must necessarily and without question, result to the guarantor, that he is

not released or discharged from his obligation. Law is common sense, and if one guarantee the terms and provisions of a lease of another at \$5,000 a year for five years, and voluntarily or by agreement the rent is reduced to \$2,000 a year, without any further covenants or conditions in any respect changing the remaining provisions of the lease, would it not be unreasonable, and I may say almost irrational, to hold that the surety is discharged because he is necessarily benefited by a release of a contingent liability to the extent of \$15,000 for the full term? I am of the opinion, and I so decide this case, that where an agreement is altered or changed, and the change is made without the knowledge or consent of the surety or guarantor, but where it appears and it is self-evident, without the necessity of any inquiry, that the alteration cannot be otherwise than beneficial to the surety, he is not discharged from liability." See also *Dodd vs. Vucovich et al.*, 38 Mont. 188; 99 Pac. 296.

²⁸ *Calvert vs. The London Dock Co.*, 2 Keen 638. "The argument, however, that the advances beyond the stipulations of the contract, were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety—and the answer has always been, that the surety himself was the proper judge of that—and that no arrangement, different from that contained in his contract, is to be forced upon him."

See also *Polak vs. Everett*, 1 Q. B. Div. 676, *Mellor, J.*: "The surety is entitled not to be affected by any-

The customary clause in building contracts reserving a percentage of the contract price to be paid when the work is completed is a stipulation which can not be waived without discharging the surety, and it is no answer to this defense that such advancements in excess of the requirements of the contract were beneficial to the principal, by enabling him to proceed with the work, and so beneficial to the surety.²⁹

In cases where the contract of the surety incorporated by reference the main contract, or where it is shown the surety contracts with knowledge of the terms of the main contract,

thing done by the creditor, who has no right to consider whether it might be to the advantage of the surety or not. The surety is entitled to remain in the position in which he was at the time when the contract was entered into."

A slight modification of this appears in *Holme vs. Brunskill*, 3 Q. B. Div. 495, in which the holding is that where it is self-evident without inquiry, that the change is beneficial to the surety, that the surety will not be discharged, but that if any evidence is necessary to establish whether or not the change is prejudicial to the surety, the change will be deemed material and the surety discharged.

In this case the contract was a leasehold upon which defendant was surety. The parties to the lease modified it by the tenant giving up a small part of the land in consideration of a reduction of a corresponding part in the rent.

The fact as to whether this was prejudicial to the surety was in the lower court left to the jury and they found it was not. The leaving of this question to the jury was held in the Court of Appeals to be error. A dissenting opinion holds, "Where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract.

"My opinion is in accordance with the finding of the jury, and it will be most dangerous in this particular case to put ourselves in the place of a jury and because we think seven acres may make a difference, or £10 a year may make a difference, to set aside the finding of the jury,

which is that neither one is material or substantial. I think the surety is not released. The doctrine of the release of suretyship is carried far enough, and to the verge of sense, and I shall not be one to carry it any further."

See also *Reese vs. United States*, 9 Wall. 13, *Field, J.* (p. 21): "Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage of the sureties. They have a right to stand upon the very terms of their undertaking." See also *John A. Tolman Co. vs. Hunter*, 113 Mo. App. 671; 88 S. W. 636.

Martin vs. Thomas, 24 How. (U. S.) 315; *Ohester vs. Leonard*, 69 Conn. 495; 37 Atl. 397; *Simonson vs. Grant*, 36 Minn. 439; 31 N. W. 861; *Ryan vs. Morton*, 65 Tex. 258; *Post Adm. vs. Losey*, 111 Ind. 74; 12 N. E. 121; *Snodgrass vs. Shader*, 168 S. W. 567; *Zeigler vs. Hallahan*, 131 Fed. 205; 66 C. C. A. 1; *Antisdel vs. Williamson*, 165 N. Y. 372; 59 N. E. 207; *Weiss vs. Leichter*, 113 N. Y. S. 999; *Utterson vs. Elmore*, 136 S. W. 9; 164 Mo. App. 646; *Hubbard vs. Reilly*, 98 N. E. 886; 51 Ind. App. 19; *Bauschard Co. vs. Fidelity & Casualty Co.*, 21 Pa. Sup. Ct. Rep. 370.

²⁹ *Evans vs. Graden*, 125 Mo. 72; 28 S. W. 439; *Bragg vs. Shain*, 49 Cal. 131; *Board of Com'rs vs. Branham*, 57 Fed. Rep. 179.

some courts hold that this affords a special reason for the rule that the surety is discharged by any material alteration whether beneficial to him or not. But that if such reference is not made or such knowledge of the main contract is not shown, the surety will not be discharged by alterations not injurious to him.³⁰

§80. Alterations enlarging the principal liability.

Changes in the relations between the principal and creditor resulting in larger responsibilities upon the principal will discharge the surety or guarantor.

Thus a Surety upon the bond of a bank cashier was held to be discharged by an increase of the capital stock of the Bank from \$300,000 to \$750,000. This increase of capital involving increase of responsibility was considered a material increase of risk for the Surety.³¹

A change in the business of the creditor which places new duties upon its agent will discharge the Surety of the agent, although the latter continues nominally in the same employment.³²

A private banking company is merged by incorporation into an Insurance & Trust Co. This was held to discharge the

³⁰ Sanderson vs. Aston, L. R., 8 Exchq. 73, *Kelly, C.B.*: "The authorities cited go to show that we are to look at the terms of the surety's engagement; not at the terms of any agreement between the employer and employed, unless these terms are made part of the surety's agreement. . . . And if it clearly appeared that the surety had entered into the agreement on the faith of the original contract, that is, if notice had been given to him of the terms of the contract, and he had, after that notice, entered into this bond, he would undoubtedly have been discharged by the alteration."

Pollock, B. (referring to *Whitcher vs. Hall*, cited Ante Sec. 73): "That case (which was no doubt a very strong decision) has been acted on ever since, when the party who

has become surety has taken care that the original agreement should be made part of his contract. But in the cases cited to us, when the original contract was not made part of the surety's contract, but the Court has nevertheless said that the surety was discharged, there has been some material alteration in the terms of the original agreement, in the sense that the surety has been injured or put in a worse position by the change."

³¹ *Grocers' Bank vs. Kingman*, 16 Gray 473. See also *Chandler Lumber Co. vs. Radke*, 136 Wis. 495; 118 N. W. 185.

Contra—Lionberger vs. Krieger, 88 Mo. 160.

³² *Blair vs. Insurance Co.*, 10 Mo. 560.

In this case the Life Ins. Co. engaged in banking and this was held to discharge the Surety of the agent.

sureties upon the bond given the Banking Co. from all liabilities for defalcation committed after the incorporation.³³

§81. Discharge of promisor by extension of time.

The defense of "giving time" to the principal is founded upon the fact that any change in the time when the contract is to be performed is a material alteration of the main contract. It has been said that all other terms of the contract remaining the same, the *mutual consent* of the original parties that the payment or performance may be deferred, is not a substitution of a new contract,³⁴ but this is merely another form of statement that a mere acquiescence in a delay in performance is not an extension of time within the meaning of the rule. A *contract* or *agreement* between the original parties to extend the time of performance is clearly such an alteration of the main contract as will discharge the Surety or Guarantor, if such extension is without his consent.³⁵

³³ Bensinger vs. Wren, 100 Pa. 500.

³⁴ Benjamin vs. Hillard, 23 How. 165.

³⁵ Ide vs. Churchill, 14 O. S. 383.

Ranney, J.: "The obligation of the surety can only be created in writing, and no equitable extension of its terms, by construction or otherwise, is allowed. Every contract is composed of the material terms and stipulations embraced in it, and, among these, none is more important than the time of performance. It follows, from the principles already stated, that whatever changes any of these material terms and stipulations, so as to destroy the *identity* of the obligation to which the Surety acceded, necessarily discharges him from liability. An engagement to pay money in six months, is not the same as one to pay it in twelve months; and if the creditor, by a valid agreement with the debtor, extends the time of performance from

the shorter to the longer period, he supersedes the old obligation by the new, and cannot enforce payment until the longer period has elapsed. If the Surety is sued upon the old agreement to which alone his undertaking was accessory, he has only to show that *that* has ceased to exist, and no longer binds his principal; and if he is sued upon the substituted agreement, he is entitled, both at law and in equity, to make a short and conclusive answer *non haec in foedera veni*. But such an agreement between the principal parties, is perfectly valid and legal; and until some method can be devised for depriving the principal of the benefits of a valid agreement, or of binding the surety to an agreement to which he never acceded (a work hitherto thought not to be within the powers of either Courts or Legislatures) the discharge of the latter must ensue."

Thomas vs. Stetson. 59 Me. 229;

Moreover, extension of time to the principal, is more than a mere alteration. It is in many cases an increase of risk, and in all cases the Surety or Guarantor is deprived of the right to pay the debt at maturity, and of immediate subrogation to the rights of the creditor against the principal. This right to subrogation is an equity inherent in all contracts of suretyship. The discharge of the promisor is not, however, dependent on showing injury to the promisor. It is the *agreement* to extend which releases the promisor, and the discharge is from the time of that agreement. The subsequent inconvenience or damage of the promisor does not enter into the question of the release, since the release has already been accomplished.³⁶

§82. Agreement for extension must be for a consideration.

An agreement for extension will not be binding or valid unless based upon a consideration. It will not amount to a substitution of a new contract unless the parties have placed themselves so that they are no longer bound by the terms of the original contract as to the time of performance. A mere passive delay or acquiescence in the default of the principal or even mutual assent to a continuation of the default, is not "giving time" within the meaning of the rule, for such an understanding of the parties, unless it take the form of a contract supported by a consideration, may be disregarded by either party.

The original agreement subsists and remains in full force, notwithstanding the parties to it see fit not to insist upon its performance or even consent to its non-performance. There

Henderson vs. Ardery, 36 Pa. 449; Meggett vs. Baum, 57 Miss. 22; Dodgson vs. Henderson, 113 Ill. 360; Price vs. Dime Savings Bank, 124 Ill. 317; 15 N. E. 754; Mobile & Montgomery Ry. vs. Brewer, 76 Ala. 135; Yeary vs. Smith, 45 Tex. 56; Roberts vs. Richardson, 39 Iowa 290; Todd vs. Greenwood School Dist., 40 Mich. 294; Edwards vs. Coleman, 6 T. B. Mon. (Ky.) 567; Insurance Co. vs. Hanck, 83 Mo. 21; Deal vs. Cochran, 66 N. C. 269; Fanning vs. Murphy, 126 Wis. 538; 105 N. W. 1056; Diehl vs. Davis, 89 P. 532; 75 Kans. 38; Wright vs. Deaver, 114 S. W. 165; 52 Tex. Civ.

App. 130; Antisdel vs. Williamson, 165 N. Y. 372, 59 N. Y. 207.

³⁶ Bowmaker vs. Moore, 7 Price 223; Samuell vs. Horwarth, 3 Meriv. 272; Rees vs. Berrington, 2 Ves. 540; Tuohy vs. Woods, 122 Cal. 665; 55 Pac. 683; Revell vs. Thrash, 132 N. C. 803; 44 S. E. 596.

Contra—Holding compensated corporate surety not discharged where it does not appear that the extension of time was unreasonable or that the surety was prejudiced thereby. U. S. F. & G. Co. vs. United States, 178 Fed. 692; 102 C. C. A. 192; Guaranty Co. vs. Pressed Brick Co., 191 U. S. 416;

having been no consideration to support the extension, the creditor is not precluded from pursuing his remedy against the principal and the promisor under these circumstances cannot claim his discharge.³⁷

The payment by the principal of obligations already due will not amount to a consideration for an extension; if at the maturity of the debt the principal agrees to pay part of the amount due, providing the creditor will extend the time for the balance, the extension, although agreed to, will not be binding on the creditor, even though the debtor pays the amount stipulated, since his agreement to pay a part of the sum due creates no new obligation, as he is already bound to pay this amount at this time.³⁸

Where the agreement for extension has been set aside by the creditor on the ground of fraud by the principal the surety will not be discharged since there never was a binding agreement for the extension.^{38a}

The surety is not discharged where an attorney to whom a note had been sent for collection gives the debtor an extension of time, since it is beyond the scope of his authority and therefore not binding on the creditor.^{38b}

An agreement to extend in consideration of a payment on the debt before it is due will be binding, even though the time till maturity is only one day.³⁹

Philadelphia vs. Fidelity & Deposit Co., 231 Pa. 208; 80 Atl. 62.

³⁷ Boardman vs. Larrabee, 51 Conn. 39; Tobin Canning Co. vs. Fraser, 81 Tex. 407; 17 S. W. 25; Lowman vs. Yates, 37 N. Y. 601; Olmstead vs. Latimer, 158 N. Y. 313; 53 N. E. 5; First Nat. Bank vs. Lineberger, 86 N. C. 454; Zane vs. Kennedy, 73 Pa. 182; Shaffstall vs. McDaniel, 152 Pa. 598; 25 Atl. 576; Goodwyn vs. Hightower, 30 Ga. 249; Sullivan vs. Hugely, 48 Ga. 486; Roberts vs. Stewart, 31 Misc. 664; Ford vs. Beard, 31 Mo. 459; Fair vs. Pengelly, 34 Up. Can. (Q. B.) 611; Robinson vs. Dale, 38 Wis. 330; Hayes vs. Wells, 34 Md. 512; Berry vs. Pullen, 69 Me. 103; John M. Parker & Co., vs. Guillot, 118 La. 223; 42 So. 782; Eureka Stone Co. vs. First Christian Church, 86 Ark. 212; 110 S. W. 1042; Almon H. Fogg Co. vs. Bartlett, 75 Atl. 380

(Me.); Atlantic Trust Co. vs. Union Trust Co., 110 Va. 286; 67 S. E. 182.

³⁸ Halliday vs. Hart, 30 N. Y. 474; Parmelee vs. Thompson, 45 N. Y. 58; Solary vs. Stultz, 22 Fla. 263; Jenkins vs. Clarkson, 7 O. 72; Turnbull vs. Brock, 31 O. S. 649; Sully vs. Childress, 106 Tenn. 109; 60 S. W. 499; Schwartz vs. Smith, 128 N. Y. S. 1; Stroud vs. Thomas, 139 Cal. 274; 72 Pac. 1008.

^{38a} Red River National Bank vs. Bray, 148 S. W. 290; 105 Tex. 312.

^{38b} Hall vs. Presnell, 72 S. E. 985; 157 N. C. 290.

³⁹ Uhler vs. Applegate, 26 Pa. 140.

But see Weaver vs. Prebster, 37 Ind. App. 582; 77 N. E. 674, where it was held that the payment on June 18, of one year's interest due on June 26, does not constitute a consideration for a contract to extend the time of payment of such note from June 26.

§83. Payment of advance interest as a consideration for extension.

The payment in advance of the legal rate of interest furnishes an adequate consideration for an agreement to extend the time of payment of the principal obligation. If the debtor does not pay at maturity the law imposes upon him an obligation to pay interest on the debt so long as he retains the money, but there is no obligation to pay such interest in advance. The receipt of the creditor of advance interest imports a consideration and will make valid and binding his promise to extend the time of payment.⁴⁰

It has been held that an agreement to extend payment on a note is binding upon the parties, so as to discharge the non-consenting sureties, if the debtor promises to pay the regular legal rate of interest for a specified time, and that it is not necessary that such interest be paid in advance in order to create a consideration.⁴¹

⁴⁰ *People's Bank vs. Pearsons*, 30 Bt. 711; *Maher vs. Lanfrom*, 86 Ill. 513; *Kaler vs. Hise*, 79 Ind. 301; *Merchants Ins. Co. vs. Hauck*, 83 Mo. 21; *Limelock Bank vs. Mallett*, 34 Me. 547; *Rose vs. Williams*, 5 Kan. 483; *Wyatt vs. Dufreue*, 106 Ill. App. 214; *Red River Nat. Bank vs. Bray*, 132 S. W. 968; *Bedford vs. Kelley*, 139 N. W. 250; 173 Mich. 492.

The payment of usurious interest in advance is a good consideration for extension. *Wild vs. Howe*, 74 Mo. 551; *Osborn vs. Low*, 40 O. S. 347; *Myers vs. Bank*, 78 Ill. 257; *Lemmon vs. Whitman*, 75 Ind. 318; *Flemming vs. Barden*, 126 N. C. 450; 36 S. E. 17; *Glenn vs. Morgan*, 23 W. Va. 467; *Niblack vs. Champeny*, 10 S. D. 165; 72 N. W. 402; *Froude vs. Bishop*, 49 N. Y. S. 955.

Contra—Farmer's and Trader's Bank vs. Harrison, 57 Mo. 503.

The payment of usurious interest fails as a consideration in Mississippi, where the penalty of usury is the forfeiture of the entire interest. *Polkinghorne vs. Hendricks*, 61 Miss. 366.

In those states where the payment of usurious interest is considered as a part payment on the debt, the agreement to give time is not supported by any consideration and the

surety is not discharged. *Nightingale vs. McGinnis*, 34 N. J. L. 461; *Hartman vs. Danner*, 74 Pa. 36; *Cornwell vs. Holly*, 5 Rich. 47; *Jennness vs. Cutler*, 12 Kan. 500.

⁴¹ *McComb vs. Kittridge*, 14 O. 351; *Read, J.*: "It is just as competent for the principals to a note to extend the time of payment for a specified period, as it was to fix the time of payment originally. If the lender of money, secured by a note, after the same becomes due, contracts with the borrower that the time for paying the same shall be extended for one year, or for any other period, upon consideration that the borrower shall pay the legal or less rate of interest, why is not that a binding contract? The lender, by this contract, secures to himself the interest on his money for the year; and the borrower precludes himself from getting rid of the payment of interest, by discharging the principal. It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege at any time, of getting rid of the payment of interest by discharging the principal. By this contract, the right to interest is secured for a given period, and the right to pay off the principal, and get rid of paying the interest, is

A promise by the principal debtor to pay usurious interest stands upon the same basis. The effect of such contract is to bind the party to pay at most, only the legal rate, and it may be doubted whether such promise to pay the legal rate or usurious interest, adds any new obligations to those already resting upon the debtor.⁴²

An agreement to pay a higher rate than the legal rate and not tainted with usury, is a good consideration and will support an extension.⁴³

The payment of interest in advance merely supplies the element of consideration and does not of itself amount to a contract to extend,⁴⁴ although such payment is *prima facie* evidence of an agreement to extend.⁴⁵

also relinquished for such period. Here, then, are all the elements of a binding contract. But it is said there is no consideration for the extension of time, because the law gives six per cent. after the note is due. But the law does not secure the payment of this interest for any given period, or prevent the discharge of the principal at any moment."

This seems to be the entire question, for if the promise to pay interest is a consideration, then, for that reason, the debtor is precluded for a given period from discharging the debt; and if the promise to pay interest is not a consideration, then the debtor is not so precluded. *Chute vs. Pattee*, 37 Me. 102; *Moore vs. Redding*, 69 Miss. 841; 13 South. 849; *Fambro vs. Keith*, 122 S. W. 40.

Contra—*Fanning vs. Murphy*, 126 Wis. 538; 105 N. W. 1056; *Dean vs. Sedan Milling Co.*, 19 Cal. App. 28; 124 Pac. 736.

See also *Wood vs. Newkirk*, 15 O. S. 295. Here the holding was, that the promise although to pay usurious interest was binding for the legal rate, and hence there was sufficient consideration to support an extension. *Bank vs. Walter*, 104 Tenn. 11; 55 S. W. 301.

⁴² *Reynolds vs. Ward*, 5 Wend. 501; *Witmer vs. Ellison*, 71 Ill. 301; *Meiswinkle vs. Jung*, 30 Wis. 361; *Scott vs. Hall*, 6 B. Mon. (Ky.) 285.

The execution of a note for the usurious interest agreed upon is a

good consideration for the extension. The creditor who accepts such a note is not in a position to say that it is void and hence, as to him, the extension based upon this note as a consideration, is valid, although the maker of such note for usurious interest might defend against it. *Moulton vs. Poston*, 52 Wis. 169; 8 N. W. 621; *Scott vs. Saffold*, 37 Ga. 384; *Corielle vs. Allen*, 13 Iowa 289.

Contra—*Kyle vs. Bostwick*, 10 Ala. 589; *Anderson vs. Mannon*, 7 B. Mon. (Ky.) 217; *Smith vs. Hyde*, 36 Vt. 303.

The rule however seems to be different when no note is given and the agreement to pay usurious interest rests in parol. *Cox vs. Mobile Co.*, 37 Ala. 320; *Galbraith vs. Fullerton*, 53 Ill. 126; *Benz vs. Pullen*, 69 Me. 101; *Thayer vs. King*, 31 Hun 437; *Payne vs. Powell*, 14 Tex. 600.

⁴³ *Fawcett vs. Freshwater*, 31 O. S. 637; *Dodgson vs. Henderson*, 113 Ill. 360.

Contra—*Abel vs. Alexander*, 45 Ind. 523.

⁴⁴ *Oxford Bank vs. Lewis*, 8 Pick. 47; *Haydenville Bank vs. Parsons*, 138 Mass. 53; *Morse vs. Blanchard*, 117 Mich. 37; 75 N. W. 93; *New York Life Ins. Co. vs. Casey*, 178 N. Y. 381; 70 N. E. 916; *Prussing vs. Lancaster*, 234 Ill. 462; 84 N. E. 1062.

⁴⁵ *Scott vs. Saffold*, 37 Ga. 384; *Woodburn vs. Carter*, 50 Ind. 376; *Coster vs. Mesner*, 58 Mo. 549; *Lawrence vs. Thom*, 9 Wyo. 414; 64 Pac. 339; *Revell vs. Thrash*, 132

§84. Agreement for extension must be for a definite time.

An important element of a contract for extension is that it must be for a definite and fixed time, otherwise no obligation rests upon the creditor to forbear action, since no breach of the agreement is provable. If it cannot be determined to what time the extension runs, then the agreement is void for uncertainty.⁴⁶ There being no valid definite extension, the surety or guarantor is not discharged.

An agreement to extend till "some time in the summer," will be void for uncertainty.⁴⁷ Also an extension till "after harvest."⁴⁸ Where the extension was for twenty or thirty days, it was considered a binding agreement for twenty days.⁴⁹

§85. Extension of time by the execution and delivery of a note for the debt, payable at a later date.

If the principal and the creditor agree upon an extension of time, and the principal executes and delivers to the creditor his promissory note covering the entire debt maturing at the date agreed upon, such new note will operate to extinguish or postpone the original obligation, and as a substitution of a new and independent contract between the debtor and creditor, and a surety or guarantor of the first contract is released.⁵⁰

Such a transaction is not strictly a contract for extension,

N. C. 803; 44 S. E. 596; English vs. Landon, 181 Ill. 614; 54 N. E. 91; Schieber vs. Traedt, 19 Ind. App. 349; 49 N. E. 605; Hubbard vs. Ogden, 22 Kan. 363; Windhorst vs. Bergendahl, 111 N. W. 544; 21 S. D. 218.

⁴⁶ Jenkins vs. Clarkson, 7 O. 72; Ward vs. Wick, 17 O. S. 159; Menifee vs. Clark, 35 Ind. 304; Beach vs. Zimmerman, 106 Ind. 495; 7 N. E. 237; Freeland vs. Compton, 30 Miss. 424; Woolfolk vs. Plant, 46 Ga. 42; Morgan vs. Thompson, 60 Ia. 280; 14 N. W. 306; Thompson vs. Robinson, 34 Ark. 44; Hayes vs. Wells, 34 Md. 512; Clark vs. Gerstley, 204 U. S. 504.

⁴⁷ Miller vs. Stem, 2 Pa. 286.

⁴⁸ Findley vs. Hill, 8 Ore. 247.

But see Moulton vs. Posten, 52 Wis. 169; 8 N. W. 621, where it is held that an extension till "after threshing" was sufficiently definite

to be binding and that the surety not consenting was discharged.

⁴⁹ Ilamilton vs. Prouty, 50 Wis. 592; 7 N. W. 659.

⁵⁰ Manning vs. Alger, 85 Ia. 617; 52 N. W. 542; American Iron & Steel Mfg. Co. vs. Beall, 101 Md. 423; 61 Atl. 629; National Park Bank vs. Koehler, 204 N. Y. 174; 97 N. E. 468; Smith vs. First Nat. Bank, 5 Ga. App. 139; 62 S. E. 711; People vs. Grant, 138 Mich. 60; 100 N. E. 1006.

It is also held that the acceptance of such note by the creditor raises an implied agreement to extend the original obligation and that the surety not consenting is discharged. Hubbard vs. Gurney, 64 N. Y. 457; Stuart vs. Lancaster, 84 Va. 772; 6 S. E. 139; Chickasaw Co. vs. Pitcher, 36 Iowa 593; Dixon vs. Spencer, 59 Md. 246.

But see Hummelstown Brownstone Co. vs. Kuerr, 25 Pa. Sup. Ct. 465.

but is in the nature of a payment, but whether the original debt is merged in the new promise, and so extinguished, or merely postponed, is immaterial so far as its effect upon the surety, since the creditor cannot enforce his rights upon either the original or substituted agreement till the maturity of the latter.

The creditor loses his rights against the surety, even if he has the option to bring his action at the maturity of the new note, either upon the original or substituted contract.

It has been held that the execution of a note for a past due obligation, where there is no express agreement for an extension, does not preclude the creditor from surrendering the note before it is due and proceeding upon the original indebtedness.⁵¹ It follows of course that the application of this rule prevents the discharge of the surety.

The taking of the debtor's note with the expressed intention and understanding that the surety is to remain liable, will not suspend the remedy on the main contract, such note being merely collateral will not operate to release the surety.⁵²

If for any reason the new note is invalid the sureties on the original note are not discharged since there never was a valid extension of time granted to the debtor.^{52a}

§36. Collateral securities maturing at a later date.

A contract to extend time will not be implied from the fact that the creditor accepts from the debtor collateral securities maturing at a later date, unless such collaterals are taken as a substitution for, or in payment of, the original obligation, as distinguished from their use merely as additional security.⁵³ While such additional security implies an assent by the cred-

⁵¹ Moore vs. Fitz, 59 N. H. 572; Gordon vs. Price, 10 Ired. 385; Marshall vs. Marshall, 42 Ala. 149; Breitung vs. Lindauer, 37 Mich. 217; Poole vs. Rice, 9 W. Va. 73; Hall vs. First Nat. Bank, 5 Kan. App. 493; 47 Pac. 556.

Contra—Mobile Life Ins. Co. vs. Randall, 71 Ala. 220.

⁵² Paine vs. Voorhees, 26 Wis. 522; Jones vs. Sarchett, 61 Iowa 520; 16 N. W. 589.

The liability of the surety or

guarantor is unaffected by the fact that the debtor gives his note maturing at the same time as the main contract. Case vs. Howard, 41 Iowa 479; Robinson vs. Dale, 38 Wis. 330.

^{52a} Corydon Deposit Bank vs. McClure, 140 Ky. 149, 130 S. W. 971.

⁵³ Austin vs. Curtis, 31 Vt. 64; Remsen vs. Graves, 41 N. Y. 471; Wade vs. Staunton, 5 How. (Miss.) 631; Sigourney vs. Wetherell, 6 Met. 553; Merriman vs. Barker, 121 Ind. 74; 22 N. E. 992.

itor that payments may be delayed, yet the elements of a binding contract to extend, cannot be supplied from this implication, and unless an express agreement for extension is shown, the surety is not discharged.⁵⁴ The giving of collateral security is a good consideration for an agreement to extend⁵⁵ and the agreement to extend in consideration of the additional security may be shown by parol.⁵⁶

§87. Extension of time by act of legislature.

Sureties upon bonds of Public Officers are discharged by acts of the Legislature extending the time within which such officers must settle their accounts.

No good reason is apparent why any different rule should apply in cases where the State is a party than in cases of suretyship between individuals.

No consideration is necessary to support an extension in such a case, as it does not result from a contract as in the case of an individual creditor. The act of the Legislature is binding upon all the citizens and officers of the State, and the extension until the act is repealed, is just as effectual as if brought about by a valid contract between the debtor and creditor.

It only differs from an individual contract of extension in that, in the case of extension by the Legislature, the act may be repealed and the original date of maturity restored without the consent of the debtor, while as between individuals the original contract can be restored only by mutual assent. Yet it is nev-

⁵⁴ German Savings Inst. vs. Vahle, 28 Ill. App. 557; Firemen's Ins. Co. vs. Wilkinson, 35 N. J. Eq. 160; Burke vs. Cruger, 8 Tex. 66; Bren-
gle vs. Bushey, 40 Md. 141; Thurs-
ton vs. James, 6 R. I. 103. In this
case the debtor executed a mortgage
to secure a debt for which a surety
was already bound. The mortgage
contained a defeasance clause, pro-
viding if the debt was paid in five
years that the mortgage should be

void, held that this of itself did not
suspend action on the debt for five
years, and that the surety was not
released.

Contra — Munster & Leinster
Bank vs. France, 24 L. R. Ir. 82.

⁵⁵ Overend Gurney & Co. vs. Ori-
ental Financial Corp., L. R., 7 H. L.
348; Kane vs. Cortesy, 100 N. Y.
132; 2 N. E. 874.

⁵⁶ Morse vs. Huntington, 40 Vt.
488.

ertheless a binding extension so long as the law remains in force.⁵⁷

§88. Giving time to surety — Effect upon co-surety.

A contract between the creditor and one of several co-sureties, extending the time of payment as to such surety, does not prevent the creditor from proceeding at once against the principal, but such an arrangement interferes with a right of the co-sureties, for if the co-sureties pay the debt, they could not recover contribution from the surety to whom the indulgence was granted until the expiration of the extension. For this

⁵⁷ *State vs. Roberts*, 68 Mo. 234; *Johnson vs. Hacker*, 8 Heisk. (Tenn.) 382; *Davis vs. People*, 1 Gilm. (Ill.) 409; *People vs. McHatton*, 2 Gilm. (Ill.) 638; *King Co. vs. Ferry*, 5 Wash. 536; 32 Pac. 538; *Pybus vs. Gibb*, 6 El. & Bl. 902. *Lord Campbell, C. J.*: "It may be considered settled law that, where there is a bond of suretyship for an officer, and, by act of the parties or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided. . . . There is no inconvenience; for, when an Act of Parliament alters the duties of an officer, it will be easy to require him to give fresh sureties, or the surety bonds may be framed so as to continue the liability of the sureties, whatever alterations might take place by the act of the Legislature."

The Courts of several States have distinctly declined to adopt the view stated in the text and hold that the public officers accept their office, and give their bonds, affected with notice of the sovereign rights of the people, through their Legislature, to control the duties of such officers by such enactments as the public good requires, and that their sureties are

charged with this notice, and that no contract exists between the officer and the State to which any contract of extension could apply. That the bond is a special contract authorized by law, and that mutual assent to any changes thereafter made in the law, must be implied. *Worth vs. Cox*, 89 N. C. 44; *Commonwealth vs. Holmes*, 25 Gratt. 771; *State vs. Swinney*, 60 Miss. 39.

In the case of *State vs. Carleton*, 1 Gill (Md.) 249, the bond obligated the principal to pay over the money to the State "At such time as the Law shall direct." The Legislature fixed a later date for settlement than the one in force at the time the bond was executed. It was held that this did not discharge the surety, on the ground that the condition of the bond reserved to the State the right to grant an indulgence to the principal.

In *Lane vs. Howell*, 1 B. J. Lea (Tenn.) 275, the County Court entered an order on its journal, extending the time for tax collectors to make their settlements. It was held that the sureties were not discharged, but the decision rests upon the finding that the County Court had no power to suspend the law by its order, and therefore no binding extension was effected by the order.

reason the co-sureties should be discharged to the extent of the contributory share of the surety whose contract is extended.⁵⁸ An extension of time to one who is a surety will release a third person who is a surety for such surety.

If A. is surety upon a note, and B. becomes surety for A. the relation between A. and B. is that of principal and surety, and extension of time to A. without the consent of B. would seem to invoke the general rule of the discharge of the surety, and while the extension of time to the original surety has in no way abridged the right of the creditor against the maker of the note, yet such contract between the maker and the creditor is not the one which B. secures, but his promise relates wholly to the collateral contract made by A. with the payee, and any alteration of this contract releases B.⁵⁹

§89. Giving time is not a defense if the surety is fully indemnified.

While the doctrine that the surety is discharged by the giving of time is based upon the proposition that the fixing of a new

⁵⁸ *Ide vs. Churchill*, 14 O. S. 372; *Gosserand vs. Lacour*, 8 La. Ann. 75.

See also *Way vs. Hearn*, 11 C. B. (N. S.) 774, *Erle, C. J.* (1782): "It is a well recognized rule of law, that if two persons are sureties for the performance of an act by a third, on a given day, and the time is given by (to) one without the consent of the other, the latter is discharged." *Hallock vs. Yankey*, 102 Wis. 41; 78 N. W. 156.

But see *contra*—*Dunn vs. Slee*, Holt, N. P. 399, *Park, J.*: "Undoubtedly, as between principal and surety, time given to the former, without the consent of the surety, will, under certain circumstances, discharge the surety. This rule, which now obtains in Courts of Law, was originally borrowed from Courts of Equity; and it is not technical, but founded in essential justice. We proceed by the same analogies, in our mercantile law upon bills of exchange. Time given to the acceptor

will discharge the drawer. But I am not aware that it applies between co-sureties. Each surety is liable, jointly and severally, on this bond. One surety cannot be injured by the time having been given to another." *Sherman County vs. Nichols*, 65 Neb. 250; 91 N. W. 198.

⁵⁹ In *Kennedy vs. Goss*, 38 N. Y. 320. A promise of indemnity against a debt was secured by a surety, and the defendant was surety for such surety. The promisee in the indemnity contract assigned his rights against these sureties to the original creditor who extended time to the surety on the indemnity contract and brought this action against the second surety. The holding that the defendant was not discharged appears to rest upon the theory that the original debtor, not being affected by the extension to the surety, might at any time pay the debt, and proceed against either of his indemnitors, and therefore since the

date for the performance of the contract is a material alteration: Yet the reason for the application of such a rule fails, in part, in cases where the surety has been fully indemnified against loss.

If the surety has in his possession property of the principal, or has some lien upon the property of the principal, sufficient to pay the debt, it is of no importance to him what alteration of the main contract is agreed upon by the principal and the creditor.

Under these circumstances the surety is in the situation of a principal and must pay the debt out of the property committed to his trust the same as if he were the principal debtor.⁶⁰

§90. Extension of time as a defense to persons who are in the situation of a surety.

When two or more persons are principal debtors in the original contract with the creditor, but by some subsequent arrangement between themselves one of them sustains the relation of surety as to the others, such promisor is in the situation of a surety as to the creditor, if the latter has notice of the facts which make him surety as to his co-obligors.⁶¹

This form of involuntary suretyship, though imposed without the assent of the creditor, nevertheless puts upon the creditor the duty of observing the equities due the one who has been placed in the situation of a promisor in suretyship, and any extension of time to the original obligor, who by agreement or by operation of law has become principal obligor, will discharge the one in the situation of a surety.

The same principle is involved in cases where the creditor supposes he is contracting with two persons as principal obligors, and in fact, one is as between the parties, merely surety for the other. Knowledge of the fact being brought

surety is not released as to the party with whom he originally engaged, he is not released as to the assignee of that party.

⁶⁰ Smith vs. Steele, 25 Vt. 427; Chilton vs. Robbins, 4 Ala. 223;

Kleinhaus vs. Generous, 25 O. S. 667; Turner vs. Stewart, 51 W. Va. 493; 41 S. E. 924; Hardester vs. Tate, 85 Mo. App. 624; McDougall vs. Walling, 21 Wash. 478; 58 Pac. 669.

⁶¹ Ante Sec. 23.

home to the creditor, he must thereafter treat the party as a surety.⁶²

This rests upon the theory that the injury to the surety, if his rights are disregarded, is the same, whether the creditor possessed knowledge of the suretyship at the time or acquired it subsequently.

The attitude of the parties to each other is the same, whether the suretyship is concurrent with the original contract, but without knowledge of the creditor, or whether it results from a subsequent event, in both cases, if the creditor has notice of it before the extension is made, the surety is released. This is illustrated in cases of the dissolution of a partnership, the remaining partner assuming the obligations of the firm, the retiring partner being in the situation of a surety, is discharged by an unauthorized extension.⁶³

The same relation of involuntary suretyship is established where property is sold subject to a mortgage, the purchaser assuming payment, the mortgagor is in the situation of a surety, and an extension of time to the purchaser will discharge the mortgagor.

This is the result of the holdings that a mortgagee may bring his action directly against the purchaser upon the covenants, assuming the debt of the mortgagor, and where the rule prevails that a mortgagee may sue the grantee at law, and in his own right, upon the mortgage debt, the holdings are nearly uniform that a suretyship relation arises.⁶⁴

⁶² Overend Gurney & Co. vs. Oriental Fin. Corporation, L. R., 7 H. L. 348; Bank of Missouri vs. Matson, 26 Mo. 243; Pooley vs. Harradine, 7 El. & Bl. 431; Lauman vs. Nichols, 15 Ia. 161; Wheat vs. Kendall, 6 N. H. 504; Guild vs. Butler, 127 Mass. 386.

⁶³ Rouse vs. Bradford Banking Co., L. R., 2 Ch. (1894) 32; Home Bank vs. Waterman, 134 Ill. 461; 29 N. E. 503; Colgrove vs. Talman, 67 N. Y. 95; Bailey vs. Griffith, 40 Up. Can. (Q. B.) 418; Williams vs. Boyd, 75 Ind. 286; Johnson vs. Young, 20 W. Va. 614; Smith vs. Shelden, 35 Mich. 42; Preston vs. Garrard, 120 Ga. 689; 48 S. E. 118; Lazelle vs. Miller, 40 Or. 549; 67 Pac. 307.

Contra—Rawson vs. Taylor, 30 O. S. 389, where it was held that the creditor is not bound to treat the retiring partner as a surety.

Dean & Co. vs. Collins & Mahood, 15 N. D. 535; 108 N. W. 242; McCoy vs. Jack, 47 W. Va. 201; 34 S. E. 991; First National Bank of Anniston vs. Cheney, 114 Ala. 536; 21 So. 1002; McAreavy vs. Magirl, 123 Iowa 605; 82 N. W. 363; Norman vs. Jackson Fertilizer Co., 79 Miss. 747; 31 So. 419.

⁶⁴ Union Life Ins. Co. vs. Hanford, 143 U. S. 197; 12 S. Ct. 437; Calvo vs. Davies, 73 N. Y. 211; George vs. Andrews, 60 Md. 26; Dedrick vs. Den Bleyker, 85 Mich. 475; 48 N. W. 633; Commercial Bank vs. Wood, 56 Mo. App. 214; Wyatt vs. Dufreue, 106 Ill. App. 214; Tuohy vs. Woods, 122 Cal. 665; 55 Pac. 683; Pratt vs. Conway, 148 Mo. 291; 49 S. W. 1028; Steele vs. Johnson, 96 Mo. App. 147; 69 S. W. 1065; Fanning vs. Murphy, 126 Wis. 538; 105 N. W. 1056; Sime vs.

But where the holding is that the grantee is not liable to the mortgagee upon the covenants in the deed relating to the mortgage, no relation of suretyship can be established, since there exists no principal liability to which the collateral liability of suretyship can relate. Such is the rule of the Federal Court, except where that Court is controlled by State law.⁶⁵

It is not necessary for the grantee to promise to pay the debt in order to constitute him a principal debtor, and so create an equity of suretyship in favor of the grantor, at least to the extent of the value of the property.

In such a case it has been held: "While no strict and technical relation of principal and surety arose between the mortgagor and his grantee from the conveyance subject to the mortgage, an equity did arise which could not be taken from the mortgagor without his consent, and which bears a very close resemblance to the equitable right of a surety, the terms of whose contract may have been modified. We cannot accurately denominate the grantee a principal debtor, since he owes no debt, and is not personally a debtor at all, and yet, since the land is a primary fund for the payment of the debt, and so his property stands specifically liable to the extent of its value in exoneration of the bond, it is not inaccurate to say that as grantee, and in respect to the land, and to the extent of its value, he stands in the relation of a principal debtor, and to the same extent the grantor has the equities of a surety. This follows inevitably from the right of subrogation, which inheres in the original contract of sale and conveyance. It is a definite and recognized right, which, in the absence of an express agreement, will be founded upon one implied."⁶⁶

Lewis, 128 N. W. 468; 112 N. W. 403; Hampe vs. Manke, 134 N. W. 60; 28 S. D. 501; Miller vs. Kennedy, 12 S. D. 478; 81 N. W. 506; Regan vs. Williams, 185 Mo. 620; 84 S. W. 959; Fisher vs. Spillman, 85 Kan. 552; 118 Pac. 65.

Contra—Corbett vs. Waterman, 11 Ia. 86; James vs. Day, 37 Ia. 164; Iowa Loan & Trust Co. vs. Haller, 119 Iowa 645; 93 N. W. 636.

See also Denison University vs. Manning, 65 O. S. 138; 61 N. E. 706, where it is held that the sale of mortgaged premises with an as-

sumption of the mortgage debt by the purchaser does not of itself create the relation of involuntary suretyship, but that it must appear that the payee agreed to accept the purchaser as the principal debtor, and that the payment of interest by the purchaser and the acceptance of the same by the payee is not evidence of such agreement.

⁶⁵ Shepherd vs. May, 115 U. S. 505; 6 S. Ct. 119; Keller vs. Ashford, 133 U. S. 610; 10 S. Ct. 494.

⁶⁶ Murray vs. Marshall, 94 N. Y. 611. "The grantee stood in the

Where a creditor holds a mortgage upon two pieces of property to secure the same debt, and the owner conveys one of them, the remaining property constitutes a primary fund, and the alienated property is in the situation of a surety, and will be released from the lien by an extension of time to the debtor.⁶⁷

§91. Extension by appeal or continuance in judicial proceedings.

If judgment is rendered in an action upon a debt for which another has become liable as surety or guarantor, a subsequent appeal from this judgment, or the giving of a bond in stay of execution, while it stays all legal proceedings for the collection of the debt until the case is heard upon appeal, or until the expiration of the time for which execution is stayed, yet it is not such an extension as will release the surety or guarantor.

Where the appeal or stay is taken by the principal, it is not a transaction to which the creditor is a party, and although the creditor is prevented from enforcing his demand, it is not the result of his own act, and his contract with the surety cannot thereby be affected.

If the appeal is taken by the creditor, the relations between the creditor and the surety are not affected, since the surety, notwithstanding the appeal, may at any time pay the debt and pursue his remedies against the debtor, and there being no binding extension, the surety is not released.

The creditor is precluded by his appeal from collecting his debt till his case is reached in its order, but the surety at the moment the appeal is perfected, may pay in full the creditor's claim and be entitled at once to indemnity from the debtor.

quasi relation of principal debtor only in respect to the land as the primary fund, and to the extent of the value of the land. If that value was less than the mortgage debt, as to the balance he owed no duty or obligation whatever, and as to that the mortgagor stood to the end, as he was at the beginning, the sole principal debtor. From any such balance he was not discharged, and as to that no right of his was in

any manner disturbed." *Travers vs. Dorr*, 60 Minn. 173; 62 N. W. 269; *North End Savings Bank vs. Snow*, 197 Mass. 339; 83 N. E. 1099; *Braun vs. Crew*, 183 Cal. 728; 192 Pac. 531.

⁶⁷*Lowry vs. McKinney*, 68 Pa. 294. In this case, the lien covering two pieces of land was the result of a judgment, and the judgment creditor was held under obligations to treat the alienated property as in the situation of a surety.

For the same reasons, a continuance, under the rules of Court, of a pending action upon a debt for which another is surety, is not an extension, except where such continuance is in pursuance of a binding agreement between the plaintiff and the defendant. Under these circumstances, the position of the surety has been changed, since payment to the creditor would not give to the surety the right to enforce his remedies against the principal until the time to which the parties by their contract had postponed the determination of the matter.⁶⁸

A decree of foreclosure which postpones the sale of the mortgaged land is not such an extension of the obligation as to discharge a surety on notes secured by the mortgage. The giving of time in the decree for the sale is done by the court and not by the agreement of the plaintiff, nor is it made upon any consideration.^{68a}

Sureties upon bail bonds in criminal proceedings are discharged by the continuance of the case by agreement between the State and the defendant, without the consent of the surety.⁶⁹

§91a. Extension of time as a defense under negotiable instrument codes.

Since the passage of Negotiable Instrument Codes by a large majority of the states the defense of extension of time by persons in the situation of a surety on a negotiable instrument has been eliminated. Under the heading of "Discharge of a Negotiable Instrument" the codes generally provide a person primarily liable thereon is discharged:

1. By payment in due course by or on behalf of the principal debtor.

⁶⁸ Wybrants vs. Lutch, 24 Tex. 309; Phillips vs. Rounds, 33 Me. 357. But see Bottfield vs. Gordon, 190 Mass. 567; 77 N. E. 639.

^{68a} Kissire vs. Plunkett-Jerrell Grocery Co., 145 S. W. 567; 103

Ark. 473. See also Burton vs. Anderson, 56 Ark. 470; 20 S. W. 250; Fales vs. McDonald, 32 R. I. 406; 79 Atl. 969.

⁶⁹ Reese vs. U. S., 9 Wall. 13; U. S. vs. Backland, 33 Fed. Rep. 156.

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

3. By the intentional cancellation thereof by the holder.

4. By any other act which will discharge a simple contract for the payment of money.

5. When the principal debtor becomes the holder of the instrument in his own right at or after maturity.

A person secondarily liable on the instrument is discharged:

1. By any act, which discharges the instrument.

2. By the intentional cancellation of his signature by the holder.

3. By the discharge of a prior party.

4. By a valid tender of payment made by a prior party.

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved

6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument unless the right of recourse against such party is expressly reserved.

Accordingly it has been held that since the code provides in what manner and for what causes such instruments may be discharged and by force of the rule *expressio unius est exclusio alterius*, parties upon such instruments who are primarily liable thereon cannot otherwise be relieved from responsibility for their payment. As to them the defense of extension of time is no longer available.^{69a}

But a guarantor of a negotiable instrument being only secondarily liable thereon is by the express provisions of the

^{69a} Richards vs. Market Exchange Bank, 81 O. S. 348; 90 N. E. 1000; Vanderford vs. Farmers & Mechanics Bank, 105 Md. 164; 66 Atl. 47; Lane vs. Hyder, 163 Mo. App. 688; 147 S. W. 514; Bradley Engineer-

ing & Mfg. Co. vs. Heyburn, 106 Pac. 170; 56 Wash. 628; Wolstenholme vs. Smith, 97 Pac. 329; 34 Utah 300; Cellers vs. Macchem, 49 Or. 186; 89 Pac. 426. *Ante*, Secs. 7, 8, 9, 10, 72 and notes. Brannan's Negotiable Instruments Law (3rd Ed.). pp. 315, 316.

code discharged by an extension of time unless the right of recourse is expressly reserved.^{69b}

§92. Extension of time with reservation of rights against the surety.

The reservation of the creditor's rights against the surety, when made a part of the contract of extension with the principal, results in a qualified extension merely. The creditor has bound himself not to proceed against the debtor until the maturity of the extension, but he has not changed his relations with the surety, since he has specifically reserved his right to sue him at once. This reservation of rights against the surety being a condition of the contract for extension entered into with the debtor, the latter impliedly assents that the surety may have all his original rights preserved against him as principal debtor, and although the creditor must forbear suit against the principal, yet the surety, if he pays the debt, may sue the principal at once. There is therefore no alteration of the surety's contract and no equitable reasons for urging his discharge.⁷⁰

^{69b} *Northern State Bank of Grand Forks vs. Bellamy*, 125 N. W. 888; 19 N. D. 509; *Morehead vs. Citizens Deposit Bank*, 113 S. W. 501; 130 Kent 414.

⁷⁰ *Morgan vs. Smith*, 70 N. Y. 537, *Folger, J.* (545): "The ground upon which a surety is held discharged when further time for payment is given the principal debtor, is that the rights of the surety are varied, as he cannot then, when the debt is due and payable, make payment, and thus put himself in the place of the creditor, according to the original implied contract, and enforce repayment from the principal. Where the remedies of the creditor are reserved against the sureties, notwithstanding the new agreement with the principal, the

situation of the parties is not varied and the rule does not apply. When the creditor proceeds against the surety in such case, and the surety pays, he is then entitled to the place of the creditor as it was originally, and may in turn enforce the principal, who may not set up against the surety the new arrangement with the creditor."

Salmon vs. Clagett, 3 Bland's Ch. (Md.) 125, *Bland, C.* (p. 178): "Such an agreement, reserving the remedies, might not, in many cases, be of the least benefit to the principal debtor; since it leaves him entirely at the mercy of his surety; yet if the parties do not expressly contract, the surety can have no cause to complain that the implied contract has been altered or im-

The remedies against the surety must, however, be expressly reserved. No such result can be established by implication.⁷¹

§93. Agreements not to sue as distinguished from agreements to extend — Effect upon surety.

It is a mooted question whether a valid agreement to forbear suit can be pleaded as a bar to an action, or whether the remedies of the debtor upon the breach of such a contract are merely in damages. The best considered view seems to be that such an agreement operates directly upon the original contract, and is a bar to any action till the expiration of the limit fixed.⁷²

A surety is therefore placed in the same situation as if there had been an agreement to extend the time, while there is not paired, in any way, to his prejudice; and therefore he cannot be discharged."

Sohier vs. Lohring, 6 Cush. 537, *Metcalf, J.*: "It is very obvious that a principal debtor may gain little or nothing by such composition as this with his creditor; inasmuch as he is left liable to a like proceedings against him by his sureties, which his creditor might have instituted, if no composition had been made. But if he pleases to subject himself to that liability, by voluntarily executing an agreement which has that effect, there is no legal reason why he should not be held to that agreement." *Morse vs. Huntington*, 40 Vt. 488; *Mueller vs. Dobschuetz*, 89 Ill. 176; *Dupee vs. Blake*, 148 Ill. 453; 35 N. E. 867; *Bank of Biddeford vs. McKenney*, 67 Me. 272; *Kenworthy vs. Sawyer*, 125 Mass. 28; *Rucker vs. Robinson*, 38 Mo. 154; *Price vs. Barker*, 4 El. & Bl. 760; *Kearsley vs. Cole*, 16 M. & W. 128; *Owen vs. Homan*, 4 H. L. C. 997; *Boaler vs. Mayor*, 19 C. B. N. S. 76; *Austin*

vs. Gibson, 28 Up. Can. (C. P.) 554; *Hagey vs. Hill*, 75 Pa. 108; *Koenigsburg vs. Lennig*, 161 Pa. 171; *Dean vs. Rice*, 63 Kan. 691; 66 Pac. 992; *Meredith vs. Dibrell et al.*, 155 S. W. 163, 127 Tenn. 387.

Under Negotiable Instruments Act (Acts 1899, C. 94, Par. 120), providing that a person secondarily liable on an instrument is discharged by an extension of time of payment, unless made with the assent or unless right of recourse against him is reserved, a surety on the note was not discharged by the taking of a renewal note, though he was not notified of such taking when the extension was given under express reservation of all rights against the surety or his estate.

Contra—*Gustine vs. Union Bank*, 10 Rob. (La.) 412.

⁷¹ *Boulton vs. Stubbs*, 10 Ves. 20.

⁷² *Robinson vs. Godfrey*, 2 Mich. 408; *Blair vs. Reid*, 20 Tex. 310; *Leslie vs. Conway*, 59 Cal. 442; *Staver vs. Missiner*, 6 Wash. 173; 32 Pac. 995; *Tatlock vs. Smith*, 6 Bing. 339; *Stracy vs. Bank of England*, 6

strictly any alteration of the main contract, yet the surety is deprived of his right to pay the debt and to proceed against the debtor.

It is also held that even though the effect of an agreement to forbear suit is not to bar an action on the original contract, yet the surety is discharged, since it is not to be presumed that the creditor would violate his compact with the debtor, and the creditor's hands being tied by the obligation imposed upon his conscience, as well as the liability to damages, the surety will be released.⁷³

§94. Waiver of the defense of extension of time.

If a surety or guarantor with knowledge of an extension of time, without his consent, to a principal, promises to pay the debt, he will be deemed to have waived the defense.⁷⁴

It is not necessary that such promise be made with knowledge of the legal effect of the extension as a defense. Where the facts are known and the party is so situated that by the use of ordinary diligence he might have become acquainted with his legal rights, and he neglects to do so, his ignorance is voluntary.⁷⁵

The new promise is not considered an independent undertaking, but a revival of the original promise and hence does not require a new or additional consideration,⁷⁶ and such promise need not be in writing.

A promise by the surety or guarantor to pay the debt, or au

Bing. 754; *Allies vs. Probyn*, 2 Cramp. M. & R. 408; *Bauschand Co. vs. Fidelity & Casualty Co.*, 21 Pa. Sup. Ct. 370.

The contrary doctrine is supported in *Ford vs. Beech*, 11 Q. B. 852.

See also *Frazer vs. Jordan*, 8 El. & Bl. 303; *Irons vs. Woodfill*, 32 Ind. 40; *Mills vs. Todd*, 83 Ind. 25; *Brown vs. Shelby*, 4 Ind. App. 477; *Commercial & Farmers Nat. Bank vs. McCormick*, 97 Md. 703; 55 Atl. 439.

⁷³ *Greely vs. Dow*, 2 Met. 176; *Harbert vs. Dumont*, 3 Ind. 346;

Dickerson vs. Com. Ripley Co., 6 Ind. 128; *Austin vs. Dorwin*, 21 Vt. 38; *McKaughan et al. vs. Baldwin*, 153 S. W. 660.

⁷⁴ *Fowler vs. Brooks*, 13 N. H. 240; *Porter vs. Hodenpuy*, 9 Mich. 11; *Sigourney vs. Wetherell*, 6 Met. 553; *Bank vs. Johnson*, 9 Ala. 622; *Bank vs. Whitman*, 66 Ill. 331; *Rockville Bank vs. Holt*, 58 Conn. 526; 20 Atl. 669.

⁷⁵ *Rindskopf vs. Doman*, 28 O. S. 516.

⁷⁶ *Bramble vs. Ward*, 40 O. S. 267.

admission of liability made without knowledge that an extension has been granted to the principal, will not be binding.⁷⁷

The waiver of extension may be the subject of contract at the time of the making of the main contract, by the use of any appropriate words showing such intention; thus: "It is understood that the liability of neither of us is to be affected by further time being given for payment."⁷⁸

Mere acquiescence by the surety in an extension of time to the principal, as where the surety knows of the giving of time to the principal, and fails to object to it, will not amount to a waiver of his rights.⁷⁹ Some definite, affirmative consent to the extension or waiver must be shown, although circumstances will sometimes show an estoppel in favor of the creditor, such as where an agreement is made between the creditor and the principal for an extension, upon the condition that the guarantor will make a part payment, and the guarantor in pursuance of this agreement makes the payment.⁸⁰

But it is held that the writing of a letter by the guarantor to the creditor after the maturity of the debt, requesting that the creditor give the debtor "a reasonable chance" to pay and to give him "time and opportunity to pay" was not a waiver or consent to an extension.⁸¹

§95. Delay of the creditor in pursuing remedies against the principal as a defense to the surety or guarantor.

Mere delay on the part of the creditor to proceed against the principal does not release the surety or guarantor. The creditor owes no duty of active diligence to his promisor in suretyship, except where such duty is made the subject of a condition, either express or by necessary implication.^{81a}

⁷⁷ Fay vs. Tower, 58 Wis. 286; 16 N. W. 558; Merrimack Co. Bank vs. Brown, 12 N. H. 320; Savings Bank vs. Chick, 64 N. H. 410; 13 Atl. 872; Montgomery vs. Hamilton, 43 Ind. 451; Kerr vs. Cameron, 19 U. C. C. P. (Q. B.) 366.

⁷⁸ Miller vs. Spain, 41 O. S. 376. See also National Bank vs. Murphy, 125 Iowa 607; 101 N. W. 441; Monarty vs. Bagnetto, 110 La. 598; 34 So. 701.

⁷⁹ Stewart vs. Parker, 55 Ga. 656; Edwards vs. Coleman, 6 T. B. Mon.

(Ky.) 567; American Iron & Steel Mfg. Co. vs. Beall, 101 Md. 423; 61 Atl. 629.

⁸⁰ Briggs vs. Norris, 67 Mich. 325; 34 N. W. 582.

⁸¹ Springer Lith. Co. vs. Graves, 97 Ia. 39; 66 N. W. 66; Williams vs. Gooch, 73 Ill. App. 557; Hallock vs. Yankey, 102 Wis. 41; 78 N. W. 156.

^{81a} Welch vs. Walsh, 177 Mass. 555; 58 N. E. 440; Yager vs. Kentucky Title Co., 112 Ky. 932; 66 S. W. 1027; Wilson vs. White, 102

The promisor has ample protection against the negligence and delay of the creditor in the privilege of paying the debt and bringing his own action against the principal, or by proceeding in equity to compel the principal to pay, or by requiring the creditor to sue the principal in accordance with statutory provisions, and he will not be permitted to exact from the creditor a greater degree of diligence than he himself is willing to exercise in his own interests.

This view is maintained even in cases where the delay is such as to deprive the creditor of a right of action against the principal. If the principal is deceased, and the creditor fails to prosecute the claim against the estate until barred by a statute, he may nevertheless proceed against the surety of the decedent.⁸²

Also where the principal has made a general assignment for the benefit of his creditors, the creditor may delay the presentation of his claim to the assignee, till barred by statute as against the assignee, and not lose his rights against the surety of the assignor.⁸³

S. W. 201; 82 Ark. 407; Merritt vs. Haas, 106 Minn. 275; 118 N. W. 1033; Williams vs. Kennedy, 67 S. E. 821; 134 Ga. 339; Berman vs. Elm Loan & Savings Co., 114 Mich. 191; 78 Atl. 1104.

⁸² Villars vs. Palmer, 67 Ill. 204; Moore vs. Gray, 26 O. S. 525; Hooks vs. Branch Bank, 8 Ala. 580; Banks vs. State, 62 Md. 88; Willis vs. Chowning, 90 Tex. 617; 40 S. W. 395; Yerxa vs. Ruthruff, 120 N. W. 758; 19 N. D. 13.

But see Waughop vs. Bartlett, 165 Ill. 124; 46 N. E. 197.

Contra—Johnson vs. Success Brick Machinery, 46 So. 957; 95 Miss. 169.

⁸³ Dye vs. Dye, 21 O. S. 86; Richards vs. The Commonwealth, 40 Pa. 146.

See also Sichel vs. Carrillo, 42 Cal. 493; Bull vs. Coe, 77 Cal. 54; 18 Pac. 808; Smith vs. Gillam, 80 Ala. 296; Halderman vs. Woodward, 22 Kan. 734; Cohea vs. Commissioners, 15 Miss. 437.

Contra—Auchampaugh vs. Schmidt, 70 Ia. 642; 27 N. W. 805,

Adams, J.: "It would not be denied that a surety upon a note may set up any meritorious defense which the principal, if sued, might set up on his own behalf. Now when the statute of limitations has run as against the principal, the law excuses him from setting up any meritorious defense which he may have, and allows him to rely upon the technical defense of the statute alone. The theory is that he was not under any obligations to preserve any longer the evidence of his meritorious defense if he had any, and so the Court will not inquire whether he had such defense or not. The Statute has been properly denominated the statute of repose. As the surety is allowed to set up any meritorious defense which the principal might have set up, we are not able to see why he should be required to preserve the evidence of such defense after the principal was not bound to do so. Again, when a surety pays a debt, it is his right

Where the claim is not liquidated, and the surety for that reason has no opportunity to pay within the time limited by statute, the rule cannot be applied without great injustice to the surety.

Sureties upon bonds of public officers, and bonds of a fidelity character, are placed in a different attitude with the creditor than sureties upon contracts for the payment of a definite amount at a definite time.

Where the statute provides that actions for misfeasance in office are barred within a certain time, actions against the sureties upon the bond of the officer, are barred by the same limitation.⁸⁴

It has been held that although the statute of limitations bars the creditor from recovering from the principal, yet the surety who pays this debt, may recover from the principal.^{84a} This view, although seemingly erroneous, must be held to prevent, wherever adopted, any discharge of the surety based upon a statute of limitation as to the creditor.

§96. Payment or other satisfaction as a discharge of the surety or guarantor.

No liability continues against a promisor in suretyship if the principal obligation has been satisfied by payment, or the substitution of other security in the place of the original suretyship contract.

to look to the principal for reimbursement. But a surety paying a debt, after it had become barred against the principal, would be remediless." *Bridges vs. Blake*, 106 Ind. 332; 6 N. E. 833.

⁸⁴ *State vs. Conway*, 18 O. 234; *State vs. Blake*, 2 O. S. 151.

Ranney, J.: "The Legislature has in terms limited all actions against the officer for malfeasance and nonfeasance in office to one year. This is done for his protection against these charges, made after it may well be presumed, the evidence to refute them has been

lost, or, in the multitude of official duties, the circumstances have been forgotten. After all this care to protect his rights and interests, it would indeed be singular if it was intended to leave open his liability in another form for the same causes, to be supported by exactly the same evidence, and attended by the same consequences, for fifteen years; thus, to every intent and purpose, nullifying the whole policy of the other provision."

^{84a} *Marshall vs. Hudson*, 9 Yerg. (Tenn.) 57; *Reeves vs. Pulliam*, 7 Baxt. (Tenn.) 119. (See "The Statute of Limitations in the Law of Suretyship" (1922), 17 Illinois Law Review 1.

If the debt has been paid in part, the promisor is discharged *pro tanto*.⁸⁵

Where the debtor owes two debts, to the same creditor, one of which is secured by a surety or guarantor and the other unsecured, and he pays generally on account, without any directions as to how the payment shall be applied, and no application is made by the creditor, the law will apply the payment on the secured debt.⁸⁶ The creditor may, however, make the application to the unsecured debt, if the debtor in paying does not stipulate how it shall be applied.⁸⁷

It has been held that where a creditor holds collateral to secure several debts of the same debtor, some of which are se-

⁸⁵ *Solary vs. Stultz*, 22 Fla. 263; *Gould vs. Robson*, 8 East. 580.

⁸⁶ *Bond vs. Armstrong*, 88 Ind. 65; *Eddy vs. Sturgeon*, 15 Mo. 199; *Gard vs. Stevens*, 12 Mich. 292; *Webb vs. Dickenson*, 11 Wend. 62; *Pierce vs. Knight*, 31 Vt. 701; *Carson vs. Reid*, 137 Cal. 253; 70 Pac. 89; *Exchange Bank vs. McDill*, 56 S. C. 565; 35 S. E. 260; *Lee vs. Manley*, 154 N. E. 244; 70 S. E. 385; *Allen, J.*: "The general rule as to the application of payments is that the debtor has the right, in the first instance, to direct the application of a payment made to a creditor who holds a secured and an unsecured debt, and that this right must be exercised at the time the payment is made. If the debtor does not exercise this right, the creditor may apply it to either debt, or he may apply a part to one debt and the remainder to the other, and he is not restricted to the time the payment is made. If, however, he makes the application, he cannot change it without the consent of the debtor. If neither the debtor nor the creditor makes the application, the law applies it to the unsecured debt."

⁸⁷ *Harding vs. Tift*, 75 N. Y. 461. *Rapallo, J.*: "It is contended that the right of the creditor to make the application is subject to the condition that such application be not inequitable, and such is the language used in some of the authorities cited. The equities referred to, however, are usually equities existing between the debtor and the creditor, and I have found no case recognizing those arising out of

transactions between the debtor and third persons, of which the creditor has no notice. The mere fact that there is a surety for one of the debts does not preclude the creditor from applying a payment thus received to the debt for which he has no security. . . . The money belongs to the debtor, and where the creditor is ignorant of any duty on the part of the debtor in respect to it, he may receive and apply it as if no such duty existed. If no application had been made by either party, and the duty were cast upon the Court of making the proper application, the equities of the surety would doubtless be considered. But where the application has been made by the creditor, in accordance with his apparent legal right, and in ignorance of any fact which should prevent him from making such application, I do not think he is bound to change it on the subsequent disclosure that a third party had an interest in having it otherwise applied and that the debtor had violated a duty to such third party in not directing such application. . . . It would create great confusion in commercial dealing, to hold that after the lapse of time, and when the position of the parties may have been changed by such a payment, the transaction could be reopened and the creditor be obliged to revive an unsecured debt which he had treated as paid, and apply the payment on a debt for which he had ample security." *Hanson vs. Rounsavell*, 74 Ill. 238; *Mathews vs. Switzler*, 46 Mo. 301; *Morrison vs. Bank*, 65 N. H. 253; 20 Atl. 300.

cured also by sureties and others not, that the creditor may apply the proceeds of the collateral first to the payment of the debts for which there are no securities.⁸⁸

A refusal to accept a tender of payment by the principal will release the promisor in suretyship.⁸⁹ A refusal of a tender made by the surety will have the same effect.⁹⁰

A distinction must be made, however, between a tender and a mere offer to pay. A tender is something more than a readiness to pay. It is asserting a legal right to discharge the debt by presenting to the creditor the amount in lawful money and demanding its acceptance. Merely being ready and willing to pay does not put upon the creditor any duty to protect the surety by accepting payment.⁹¹

The taking of additional security will not discharge a surety or guarantor, whether such additional security consists of the addition of a new name as surety on the same instrument,⁹² or the deposit of new collateral, or the giving of some other form of additional indemnity.⁹³

§97. Liability against surety or guarantor revived if payment or substituted security is void.

The payment of a debt for which another is surety or guarantor, or the substitution of a new security in place of the original suretyship contract, the latter being surrendered, ends

Contra—Ida County Savings Bank vs. Seidensticker, 128 Ia. 54; 102 N. W. 821, where it was held that payments on an account, in the absence of an agreement or direction to the contrary, will be applied to the satisfaction of those items of charge which are earliest in point of time.

⁸⁸ Wilcox vs. Fairhaven Bank, 7 Allen 270; Exchange Bank vs. McMillan, 76 S. C. 561; 57 S. E. 630; Cain vs. Vogt, 116 N. W. 786; 138 Ia. 631.

But see Brown vs. First Nat. Bank, 112 Fed. 901; Merchants Ins. Co. vs. Herber, 68 Minn. 420; 71 N. W. 624; Crane vs. Pacific Heat & Power Co., 36 Wash. 95; 78 Pac. 460.

⁸⁹ Joslyn vs. Eastman, 46 Vt. 258; Fisher vs. Stockebrand, 26 Kas. 565; Curia vs. Packard, 29 Cal. 194; Randol vs. Tatum, 98 Cal. 390; 33 Pac. 433; Spurgeon vs. Smith, 114 Ind. 453; 17 N. E. 105; Smith vs.

Old Dominion Building Assn., 119 N. C. 257; 26 S. E. 40.

It is held, however, that the rule stated in the text does not apply to the sureties upon the bond of a public officer, where the principal is in default of the performance of his official duty, and that a tender and refusal does not convert an official trust into a mere private liability. State vs. Alden, 12 O. 59.

⁹⁰ Hayes vs. Joseph, 26 Cal. 535; O'Connor vs. Braly, 112 Cal. 31; 44 Pac. 305.

⁹¹ Clark vs. Sickler, 64 N. Y. 231; Hiller vs. Howell, 74 Ga. 174; Wilson vs. McVey, 83 Ind. 108.

⁹² Ante Sec. 75.

⁹³ Trustees of Presbyterian Board vs. Gilliford, 139 Ind. 524; 38 N. E. 404; Sigourney vs. Wetherell, 6 Met. 553; Wadsworth vs. Allen, 8 Gratt. 174; Citizens Bank vs. Whinery, 110 Iowa 390; 81 N. W. 694; Hand Mfg. Co. vs. Marks, 36 Ore. 523; 52 Pac. 512; 53 Pac. 1072; 59 Pac. 549.

the transaction so far as the suretyship promisor is concerned and exonerates him from all further liability.

While this proposition is self-evident, yet it must be observed, that in contemplation of the law, nothing amounts to payment or satisfaction which has no value, and if that which is taken in payment is not what it purports to be, or the use or retention of it by the party receiving is prohibited by law, or for any reason becomes a nullity, then the so-called payment or substitution is not a satisfaction of the original contract, and in the absence of actual or constructive waiver of these infirmities in the medium of payment, the original contract, although surrendered, will be revived, and the liability of the surety or guarantor restored.

One of the essential elements of a novation, or the substitution of a new for an old obligation, is that the new contract must be a valid one upon which the creditor may have his remedy.⁹⁴

If the principal pays the debt contrary to the provisions of the insolvency laws, so that the creditor is required to surrender the amount paid as an unlawful preference, the surety may be held, although the evidences of the indebtedness have been given up, at the time of the payment.⁹⁵

If a new note is given in renewal of another, and the sig-

⁹⁴ *Spycher vs. Werner*, 74 Wis. 456; 43 N. W. 161; *Clark vs. Billings*, 59 Ind. 509; *Bristol Milling & Mfg. Co. vs. Probasco*, 64 Ind. 406.

⁹⁵ *Petty vs. Cooke*, L. R. 6 Q. B. C. 790. In this case the payee of a promissory note accepted the amount thereof in good faith from the principal, and without notice that the payment was a fraudulent preference, and surrendered the note. The principal afterwards entered into a composition deed for the benefit of his creditors. The trustee under the deed avoided the payment as a fraudulent preference and the payee returned the amount to the trustee, and brought suit against the surety on the note. The surety pleaded payment by the principal,

and it was held that the surety was not released. *Pritchard vs. Hitchcock*, 6 Man. & G. 151; *Swartz vs. Fourth Nat. Bank*, 117 Fed. 1; 54 C. C. A. 387; *Northern Bank of Kentucky vs. Farmers Nat. Bank*, 111 Ky. 350; 63 S. W. 604; *Hooker vs. Blount*, 97 S. W. 1083; 44 Tex. Civ. App. 162.

It is also held that even though the creditor receives the unlawful preference with knowledge of the insolvency of the principal, he may nevertheless, when compelled to surrender the preference, recover from the surety. *Harner vs. Batdorf*, 35 O. S. 113; *Watson vs. Poague*, 42 Ia. 582.

But see *Northern Bank of Kentucky vs. Cooke*, 13 Bush (Ky.) 340.

nature of the new note is forged, and the creditor relying upon the new note being genuine, surrenders the old note, the liability of the surety on the original note is not extinguished.⁹⁶

Also where an obligation taken in renewal is void on account of usury, the liability of the original contract is revived.⁹⁷

If the substituted contract is void, by reason of coverture or infancy or any other disability of the party executing it, the creditor will be restored to all his rights under the original contract,⁹⁸ and the same rule applies where a new contract is void because executed without authority.⁹⁹

§98. Voluntary release of security held by the creditor or upon which the creditor has a lien.

If the creditor has in his possession property of the principal as an additional security for the debt, or has acquired a lien upon the property of a principal, the creditor at once becomes charged with the duty of retaining such security, or maintaining such lien in the interest of the surety, and any release or impairment of this security as a primary resource for the pay-

⁹⁶ *Lovinger vs. First Nat'l Bank*, 81 Ind. 354; *Goodrich vs. Tracy*, 43 Vt. 314; *Kincaid vs. Yates*, 63 Mo. 45; *Bank vs. Buchanan*, 87 Tenn. 32; 9 S. W. 202; *Emerine vs. O'Brien*, 36 O. S. 491; *Allen vs. Sharpe*, 37 Ind. 67; *Ritter vs. Singmaster*, 73 Pa. 400; *Second Nat. Bank vs. Wentzel*, 151 Pa. 142; 24 Atl. 1087.

⁹⁷ *Bank vs. Dauckmeyer*, 70 Mo. App. 168; *Winsted Bank vs. Webb*, 39 N. Y. 325.

But see *La Farge vs. Herter*, 9 N. Y. 241, where it is held "The usurer is not allowed to show that an obligation which he has taken in satisfaction of a prior demand, is usurious and therefore void, in order to avoid the effect of such obligation as a satisfaction of a prior

demand." In this case the creditor brought suit on the substituted security, which was tainted with usury, the defense of usury being pleaded, he dismissed the action, and brought suit against the defendant, who was surety. The general rule that if a substituted contract is void on account of usury, the original contract is revived, may be deemed supported by the great weight of authority. *Burnhisel vs. Firman*, 22 Wall. 170; *Swartwout vs. Payne*, 19 Johns. 295; *Lee vs. Peckham*, 17 Wis. 394.

⁹⁸ *Godfrey vs. Crisler*, 121 Ind. 203; 22 N. E. 999; *M'Crillis vs. How*, 3 N. H. 348.

⁹⁹ *Glass vs. Thompson*, 9 B. Mon. (Ky.) 237; *Williams vs. Gilchrist*, 11 N. H. 535.

ment of a debt, will discharge the surety to the extent of the value of the property or lien released.

This is not because the parties have made any contract in respect to the additional security, but it results from the inherent equities of a suretyship relation.¹⁰⁰

The creditor is under no obligation to the promisor in suretyship to acquire any lien upon property of a principal, unless so required by the conditions of his contract, such as a guaranty of collectibility, where such duty may sometimes be implied; neither is the creditor obliged to taken any steps to get into his possession any of the property of the principal,¹⁰¹ but if, in the process of collecting the debt by proceedings at law the creditor does secure a lien by execution or attachment or otherwise, or receives into his possession some of the property of the debtor as additional security, there immediately arises a trust relation between the parties, and the creditor as trustee is bound to account to the surety for the value of the security in his hands.

The entire doctrine of subrogation in suretyship is dependent upon the immediate investment of the creditor with the obligations of a trustee whenever any rights or interests of the debtor, applicable to the debt, are placed in his control,¹⁰² and it is the right of the surety to be discharged if the creditor by his voluntary act deprive him of the benefit of this subrogation.

It readily appears, therefore, that the reasons that underlie this rule apply with equal force, whether the lien or custody of the property is acquired at the time the suretyship contract is entered into or afterwards.¹⁰³

¹⁰⁰ *Henderson vs. Huey*, 45 Ala. 275; *Winston vs. Yeargin*, 50 Ala. 340; *Kirkpatrick vs. Howk*, 80 Ill. 122; *Weik vs. Pugh*, 92 Ind. 382; *Guild vs. Butler*, 127 Mass. 386; *Cummings vs. Little*, 45 Me. 183; *Stallings vs. Bank*, 59 Ga. 701; *Bank of Monroe vs. Gifford*, 79 Ia. 300; 44 N. W. 558; *Union Bank vs. Cooley*, 27 La. An. 202; *Taylor vs. Jeter*, 23 Mo. 244; *Brown vs. Rathburn*, 10 Ore. 158; *Clow vs. Derby*,

98 Pa. 432; *Templeton vs. Shakley*, 107 Pa. 370; *Day vs. Ramey*, 40 O. S. 446; *Plankinton vs. Gorman*, 93 Wis. 560; 67 N. W. 1128; *Pearl vs. Deacon*, 24 Beav. 186; *Brown Carriage Co. vs. Dowd*, 155 N. C. 307; 71 S. E. 721.

¹⁰¹ *Otis vs. Van Storch*, 15 R. I. 41; 23 Atl. 39; *Friend vs. Smith Gin Co.*, 59 Ark. 86; 26 S. W. 374; *Hall vs. Hoxsey*, 84 Ill. 616.

¹⁰² *Post*, Chapter 10.

¹⁰³ *Campbell vs. Rothwell*, 47 L.

If the suretyship contract was made upon the condition that the principal shall furnish the creditor additional security, and the security being furnished under these conditions, is afterwards released by the creditor, the surety is wholly discharged, without regard to the value of the securities released, for such a transaction amounts to an alteration of the main contract.¹⁰⁴

In such a case the surety is entitled to his discharge even though the securities released have no value, but where the rights of the surety are dependent merely upon his equity of subrogation, as distinguished from an alteration of the contract, the surety can have no relief if the securities released are without value.¹⁰⁵

It is incumbent upon the creditor, however, to justify his relinquishment of securities by showing the worthlessness of the property or lien released.¹⁰⁶

It has been held to be a complete defense to the surety to show that the creditor has released securities of the value of the debt, even though there remains in the hands of the creditor

J. C. L. 144; *Pledge vs. Buss*, Johnson 663; *Holland vs. Johnson*, 51 Ind. 346; *Freaner vs. Yingling*, 37 Md. 491; *Willis vs. Davis*, 3 Minn. 17.

It is not necessary that the surety have any knowledge of the additional security at the time he signs, or at the time the security is given; he becomes a beneficiary of the trust relation, without notice of its existence, and can claim its benefits whenever brought to his knowledge.

Mayhew vs. Crickett, 2 Swanst. 185, *Lord Eldon, C.*: "Sureties are entitled to the benefit of every security which the creditors had against the principal debtor, and whether the surety knows the existence of those securities is immaterial."

¹⁰⁴ *Polak vs. Everett*, 1 Q. B. Div.

669; *Watts vs. Shuttleworth*, 7 Hurl. & Nor. 353; *Foerderer vs. Moors*, 91 F. 476; 33 C. C. A. 641.

¹⁰⁵ *Hardwick vs. Wright*, 35 Beav. 133; *Rainbow vs. Juggins*, 5 Q. B. Div. 422; *Blydenburgh vs. Bingham*, 38 N. Y. 371; *Green vs. Blunt*, 59 Ia. 79; 12 N. W. 762; *Lilly vs. Roberts*, 58 Ga. 363.

¹⁰⁶ *Moss vs. Pettingill*, 3 Minn. 217; *Dunn vs. Parson*, 40 Hun 77; *Allen vs. O'Donald*, 23 Fed. Rep. 573.

If the creditor fails to meet this burden by making no proof as to the value of the property or lien released, he will be deemed to have converted the property at its face value and must release the surety to the extent of such face value. *Fielding vs. Waterhouse*, 8 Jones & Spen. 424.

other securities, applicable to the debt, sufficient in value to pay the debt, and to which the surety upon recovery against him, would be subrogated, on the ground that the creditor has violated a vested right of the surety, and will not be permitted, at will, to throw upon the surety, the risk of making the balance of his securities reach far enough to cover the debt.¹⁰⁷

But the substitution of other securities of equal value,¹⁰⁸ or a compromise in good faith of a disputed collateral or lien,¹⁰⁹ will not release the sureties, for these transactions neither injure the surety nor change his position.

§99. Release of securities by the misconduct of the creditor.

It is the duty of the creditor to exercise ordinary diligence in preserving the securities in his control which are applicable to the debt for which another is surety or guarantor. The consequences to the promisor are the same whether such securities are voluntarily released, or are lost or destroyed through the carelessness or negligence of the creditor, and the promisor has the right to require the creditor to exercise the same care in protecting this property in his interest, as a prudent man would exercise in his own interest.

If the creditor leaves the property unprotected so that it is stolen or destroyed, he must answer to the surety for its value. The use of ordinary care will, however, relieve the creditor from liability to the surety for stolen or lost securities.¹¹⁰

Another form of negligence is where the creditor by his inactivity or lack of diligence, fails to do the things necessary to make the securities available.

¹⁰⁷ *Holt vs. Body*, 18 Pa. 207.

Contra—*Saline County vs. Buie*, 65 Mo. 63.

A release of an execution upon land upon which the judgment is a lien, and which remains a lien after the release of the execution, is held not to discharge the surety, since the security of the surety is not thereby diminished. *Sasscer vs. Young*, 6 Gill & Johns. (Md.) 243; *Wood vs. Brown*, 104 Fed. Rep. 203.

¹⁰⁸ *State Bank vs. Smith*, 155 N. Y. 185; 49 N. E. 680; *Thomas vs. Cleveland*, 33 Mo. 126; *Lafayette Co. vs. Hixon*, 69 Mo. 581.

¹⁰⁹ *Bedwell vs. Gephart*, 67 Ia. 44; 24 S. W. 585; *Berlin Nat. Bank vs.*

Guay, 76 N. H. 216; 81 Atl. 475. "The holder of a promissory note is under no obligation to litigate the title to collateral security at his own expense, for the benefit of a surety; but if he enters upon such litigation for the protection of all parties interested and in good faith makes a reasonable compromise with adverse claimants, a surety who had full knowledge of the situation and refused to participate in the proceeding cannot avoid payment of the note on the ground that a larger sum should have been realized from the security as a result of the suit."

¹¹⁰ *Jenkins vs. National Bank*, 58 Me. 275.

While this may properly be denominated passive negligence, it is a breach of duty toward the promisor of the same character as if the creditor had voluntarily released the securities.

Thus the principal gives a mortgage upon his property, which the creditor fails to file or put upon record until after other liens have intervened,¹¹¹ or the creditor having in his hands obligations of third persons due the principal, fails to take the necessary steps to collect the same until they become worthless.¹¹²

In such cases the surety or guarantor should be discharged, to the extent of their injury caused by the negligence of the creditor, which would be the ascertained value of the property at the time the lien could have been made effective by filing, or the amount that could have been realized on the collateral, in case the creditor had acted with due diligence.

The rule in this class of cases, however, cannot properly be extended to cover loss by mere delay in enforcing liens, although the delay renders ineffective securities that might have been applicable to the debt if an earlier action had been taken. While the promisor may be discharged if the creditor fails to file a mortgage given him by the principal, yet he is not discharged by the failure of the creditor to foreclose the mortgage.¹¹³

¹¹¹ *Burr vs. Boyer*, 2 Neb. 265; *Teaff vs. Ross*, 1 O. S. 469; *State Bank vs. Bartle*, 114 Mo. 276; 21 S. W. 816; *Sullivan vs. State*, 59 Ark. 47; 26 S. W. 194; *Capel vs. Butler*, 2 Sim. & Stu. 457; *Wulff vs. Jay*, 7 L. R. Q. B. 756; *Redlon vs. Heath*, 59 Kan. 255; 52 Pac. 862.

Contra—*Philbrooks vs. McEwen*, 29 Ind. 347.

¹¹² *Kemmerer vs. Wilson*, 31 Pa. 110; *Fennell vs. McGowan*, 58 Miss. 261; *City Bank vs. Young*, 43 N. H. 457; *Douglass vs. Reynolds*, 7 Pet. 113; *Crim vs. Fleming*, 101 Ind. 154; *First National Bank vs. Kittle*, 71 S. E. 109; 69 W. Va. 171.

¹¹³ *Schroeppe vs. Shaw*, 3 N. Y. 446; *Howe Co. vs. Farrington*, 82

N. Y. 121; *Grisard vs. Hinson*, 50 Ark. 229; 6 S. W. 906; *Sheldon vs. Williams*, 11 Neb. 272; 9 N. W. 86; *Day vs. Elmore*, 4 Wis. 190; *Fuller vs. Tomlinson*, 58 Iowa 111; 12 N. W. 127. See also *First National Bank vs. Powell*, 149 S. W. 1096.

In this case creditor sold property to the principal, reserving title in himself until paid for, taking the notes of the principal with the defendant as guarantor. It was held the creditor was under no obligations to protect the guarantor by exercising his right to claim the property on default.

See also *Meyers vs. Farmers State Bank*, 53 Neb. 824. Holding that a failure by the creditor to seize prop-

The duty of filing a mortgage results from the fact that the instrument which evidences the lien is within the sole custody and control of the creditor, with no opportunity open to the promisor to protect himself, but after the lien is created and made effective against intervening liens by filing, the promisor has the privilege of paying the debt and becoming subrogated to the rights of the creditor, thereby being placed in a position to prosecute his own foreclosure.

Again, a creditor is under no obligations to take active measures of selling securities pledged for the debt, although having notice of their probable depreciation by delay,¹¹⁴ and having acquired a lien by judgment upon the property of the principal, the creditor may suffer the same to become dormant or expire by limitation without impairing his rights against the surety.¹¹⁵

The creditor is obliged to deal with the security in his hands in good faith and with the exercise of reasonable judgment. Failure in either of these respects, if resulting injuriously to the surety, will amount to misconduct, and will release the surety.

Such would be the case, where the creditor by collusion with the debtor permits the property to be wasted. The prejudice to the surety under these circumstances does not come from mere delay, and the co-operation of the creditor in wasting the securities, even to a small extent, will taint the entire transaction, and place upon him the responsibility for the loss to the surety.¹¹⁶

erty upon which he held a chattel mortgage to secure the debt, even when requested to do so by the surety, will not release the surety.

Contra—Griffith vs. Robertson, 15 Hun 344.

¹¹⁴ Sherry vs. Miller, 7 Lea 305; Brick vs. Freehold Nat. Bank, 37 N. J. Law, 307.

¹¹⁵ Kindt's Appeal, 102 Pa. 441; Crosby vs. Woodberry, 37 Col. 1; 89 Pac. 34.

But see Hendryx vs. Evans, 120 Iowa 310; 94 N. W. 853. By levy and sale of debtor's real estate plaintiff acquired security for the debt, but he failed to procure and record

the sheriff's deed so that a subsequent mortgagee obtained a better lien. The surety was discharged to the extent of the loss suffered by reason of plaintiff's neglect.

¹¹⁶ Phares vs. Barbour, 49 Ill. 370; Nichols vs. Burch, 128 Ind. 324; 27 N. E. 737; Clopton vs. Spratt, 52 Miss. 251; Sitgreaves vs. Farmers Bank, 49 Pa. 359.

In Robeson vs. Roberts, 20 Ind. 155, no levy was made under the execution against the principal, but the property was taken out of the jurisdiction of the officers holding the writ by collusion between the principal and creditor; the creditor

And so where the creditor sells the securities at a sacrifice, by failing to exercise good judgment in consummating the sale, or because of indifference to the rights of the surety, the damage resulting from such misconduct will be chargeable to the creditor.¹¹⁷

§100. Release of securities by operation of law.

If liens are lost by reason of the operation of law, although without the knowledge of the creditor, and without his co-operation in any way, he must nevertheless be deemed responsible for the resulting damage to the surety.

A sufficient reason for this would seem to be that the surety should not suffer loss on account of the operation of rules of law which do not in any way arise as a consequence of his own acts, or as a necessary result of his contract.

If the creditor institutes legal proceedings for the collection of the debt, the negligence of the officers of the law, or the errors of the courts, must be considered as the act of his own

thereafter seeking to hold the surety, who was discharged to the extent of the property removed.

It will not, however, be considered as collusive or fraudulent for the creditor to direct the return of an execution without a levy, although the property of the principal is at hand upon which a levy might be laid. The creditor's duty is to exercise active diligence in *perserving* liens, but no such duty is imposed in *acquiring* liens. *Smith vs. Erwin*, 77 N. Y. 466; *Farmers Bank vs. Raynolds*, 13 O. 85; *Knight vs. Charter*, 22 W. Va. 422; *Summerhill vs. Tapp*, 52 Ala. 227; *Jerauld vs. Trippet*, 62 Ind. 122; *Crawford vs. Gaulden*, 33 Ga. 173; *Thornton vs. Thornton*, 63 N. C. 211; *Union Bank vs. Govan*, 18 Miss. 333.

Except where the delivery of an execution to an officer *ipse facto* creates a lien on the debtor's property. In such cases the return of the execution without sale, by direction of the creditor, will amount

to a release of a lien which would discharge the surety. *Dills vs. Cecil*, 4 Bush (Ky.) 579; *Ferguson vs. Turner*, 7 Mo. 497.

¹¹⁷ *Hutchinson vs. Woodwell*, 107 Pa. 509; *Holliday vs. Brown*, 33 Neb. 657; 50 N. W. 1042; *Allen vs. O'Donald*, 23 Fed. Rep. 573; *New England Co. vs. Randall*, 42 La. Ann. 260; 7 South. 679; *McMullen vs. Hinkle*, 39 Miss. 142.

In *Wilbur vs. Williams*, 16 R. I. 242; 14 Atl. 378, the creditor received from the principal a check for the debt and by agreement with the bank refused to pay the check, the principal, held it for 15 days; the debtor in the meantime absconding, transferring all his assets; the surety claimed his discharge because of the delay in presenting the check, and the defense was held not to be good.

Pauly Jail Bldg. Co. vs. Collins, 138 Wis. 494; 120 N. W. 225; *Y. M. C. A. vs. Ritter*, 90 Kan. 333; 133 Pac. 894.

agencies. Thus where through the act of the Sheriff the property of the principal debtor is released from the levy of an execution, the surety for the judgment debtor is discharged.¹¹⁸ So where a judgment lien is obtained by the creditor upon land of the principal, and the creditor assigns his lien to one who also acquired, by transfer from the principal, the land upon which the lien rests; this being by operation of law a merging of the lien in the fee, was held to release the surety.¹¹⁹

A further illustration of the effect of a release of security by operation of law, arises in the case of intermediate endorsers upon commercial paper. The suretyship relation of parties so placed is that the intermediate endorser is in the situation of a surety, to whom the maker or prior endorser is principal, and the subsequent party is creditor. Hence if the holder fail to make demand upon the maker till the remedy is barred against him by the Statute of Limitations, the recourse of the endorser against the maker, which is his security, has been impaired by operation of law, and the endorser is discharged.¹²⁰

Also where the prior endorser is discharged by the holder, such prior indorser is no longer liable to the intermediate endorser. This exoneration of the prior party from liability to the intermediate party, results from the operation of law, since to permit the intermediate endorser to recover from the prior, under these circumstances, would merely enable the party who had been discharged to recover back from the holder, and so leave all the parties where they started, and to avoid this circuitry of useless action, the law applies the remedy directly, and discharges all intermediate parties; but the basis of it is that a security available to a surety has been released by operation of law.¹²¹

¹¹⁸ *Miller vs. Dyer*, 1 Duv. (Ky.) 263; *Lumsden vs. Leonard*, 55 Ga. 374; *Flemming vs. Odum*, 59 Ga. 362.

But see *Summerhill vs. Trapp*, 48 Ala. 363.

¹¹⁹ *Wright vs. Knepper*, 1 Barr (Pa.) 361.

See also *Johnson vs. Young*, 20 W. Va. 614.

¹²⁰ *Shutts vs. Fingar*, 100 N. Y. 539; 3 N. E. 588.

¹²¹ *Newcomb vs. Raynor*, 21 Wend. 108; *English vs. Darley*, 2 Bos. & Pul. 61.

The discharge of a debtor in bankruptcy, or under the State Insolvency Laws, while it deprives the surety of all recourse against the principal for his indemnity, will not release the surety.¹²²

§101. Release by the creditor of property of principal in his possession or control, but not held as security for the suretyship debt.

The promisor in suretyship cannot claim his discharge because of a relinquishment by the creditor of property of the principal, unless the property is so placed that the creditor is bound to hold it in special trust to pay the particular debt for which the promisor is liable. It is not enough that the creditor has in his possession the means of satisfying the debt, but he must also have the right, conferred upon him, either by law or by contract with the owner, to so apply the property.

If the creditor holds funds of the principal arising out of some other transaction, he may pay the principal and proceed against the surety.¹²³ A bank holding the note of its depositor for which another is surety, is under no obligations to the surety to apply the deposits of the maker to the payment of the note.

¹²² *Alsop vs. Price*, 1 Doug. 160; *Wolf vs. Stix*, 99 U. S. 1; *Lackey vs. Steere*, 121 Ill. 598; 13 N. E. 518; *Steele vs. Graves*, 68 Ala. 21; *Robinson vs. Soule*, 56 Miss. 549; *Cochrane vs. Cushing*, 124 Mass. 219; *Phillips vs. Solomon*, 42 Ga. 192; *Sharpe vs. Speckenagle*, 3 Serg. & R. 463; *Post vs. Losey*, 111 Ind. 74; 12 N. E. 121; *Bank vs. Simpson*, 90 N. C. 467.

The National Bankruptcy Act of 1867 (Revised Statutes U. S., Sec. 5118) also of 1898 (Sec. 16 of the Bankruptcy Act) provide that the liability of a surety shall not be affected by the discharge of the principal as a bankrupt.

The surety is not discharged even though the creditor is one of the

petitioners who institute proceedings in involuntary bankruptcy against the principal, and joins with other creditors in proposing a composition. *Guild vs. Butler*, 122 Mass. 498; *Megrath vs. Gray*, L. R., 9 C. P. 216; *Ellis vs. Wilmot*, L. R., 10 Ex. 10; *Simpson vs. Henning*, L. R., 10 Q. B. 406; *Ex parte Jacobs*, L. R., 10 Ch. 211; *Browne vs. Carr*, 2 Russ. 600. *Post*, Sec. 287.

Contra—*Calloway vs. Snapp*, 78 Ky. 561; *In re McDonald*, 14 N. B. R. 477; *Stull vs. Bedeo*, 78 Neb. 114; 110 N. W. 861.

The liability of a surety upon an appeal bond is not for the debt but is contingent upon the recovery of the judgment against the principal. If the principal pending the appeal subsequently obtains a discharge in bankruptcy, the surety on the appeal bond is released. *House vs. Schnadig*, 235 Ill. 301; 85 N. E. 395.

¹²³ *Glazier vs. Douglass*, 32 Conn.

The bank may honor the checks of the maker of the note, after default, for the entire deposit, and hold the surety.¹²⁴

If the note is made payable at the bank, it is held that the surety is discharged if the bank does not apply the funds on deposit to the payment of the note,¹²⁵ but only to the extent of the maker's credit with the bank.^{125a}

§102. Whatever releases principal will release the surety or guarantor.

All defenses available to the principal may in general be resorted to in favor of the promisor in suretyship.

If the principal has been released by the creditor, the surety or guarantor will be released.¹²⁶ This follows from the elementary proposition of suretyship, that no collateral promise to pay the debt of another can have any force when the debt of the other has been satisfied, and since the equity of the promisor to have indemnity from the principal is cut off by this transaction, it would be manifestly unjust to require him to pay the debt.

The reason which underlies the rule discharging the surety upon the release of the principal does not apply, if the creditor, in his agreement to release, specifically reserves his remedies

393; Hollingsworth vs. Tanner, 44 Ga. 11; Baubien vs. Stoney, 1 Speers Eq. (S. C.) 508; Perrine vs. Fireman's Ins. Co., 22 Ala. 575.

¹²⁴ Strong vs. Foster, 17 C. B. 201; Nat'l Bank vs. Peek, 127 Mass. 298; Voss vs. German Bank, 83 Ill. 599; Nat'l Bank of Newburgh vs. Smith, 66 N. Y. 271; Second Nat'l Bank vs. Hill, 76 Ind. 223; Martin vs. Mechanics Bank, 6 Har. & John. 235; People's Bank vs. Legrand, 103 Pa. 309; First Nat'l Bank vs. Shreiner, 110 Pa. 188; 20 Atl. 718; Bank vs. Peltz, 176 Pa. 513; 35 Atl. 218.

Under the Uniform Negotiable Instruments Act "where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. The Illinois, Nebraska and South Dakota Acts omit this section.

¹²⁵ Commercial Bank vs. Henninger, 105 Pa. 496; German Bank vs. Foreman, 138 Pa. 474; 21 Atl. 20; Mechanics Traders Bank vs. Seitz, 150 Pa. 632; Home Bank vs. Newton, 8 Ill. App. 563; 24 Atl. 356; Pursifull vs. Pineville Banking Co., 97 Ky. 154; 30 S. W. 203; Turner vs. Hampton, 30 Ky. Law Rep. 179; 97 S. W. 761.

^{125a} Lowe vs. Reddan, 123 Wis. 90; 100 N. W. 1038.

¹²⁶ Cragoe vs. Jones, L. R., 8 Ex. 81; Ex parte Smith, 3 Bro. C. C. 1; Grundy vs. Meighan, 7 Ir. L. Rep. 519; Bull vs. Coe, 77 Cal. 54; 18 Pac. 808; Trotter vs. Strong, 63 Ill. 272; Plano Mfg. Co. vs. Parmenter, 41 Ill. App. 635; Anthony vs. Capel, 53 Miss. 350; Brown vs. Ayer, 24 Ga. 288; Riffin vs. Creath, 60 O. S. 114; 53 N. E. 1100; Paddleford vs. Thacher, 48 Vt. 574; State vs. Parker, 72 Ala. 181; Lockwood vs. Penn, 22 La. Ann. 29.

against the surety, because the principal by accepting such conditional release, thereby impliedly assents that the surety's right of indemnity shall not be impaired, and the surety not being injured should not be discharged.¹²⁷ Neither will the surety be discharged if he is fully indemnified in the transaction.¹²⁸

§103. Same subject — Release of principal by operation of law.

Whenever the law will decree the annulment of the principal contract by reason of the fault or procurement of the creditor the surety or guarantor may set up the same defense.

If the main contract is void by reason of a prohibition imposed by statute, so that the principal can not be held, the prom-

¹²⁷ It has been considered that a release of the principal, even reserving rights against the surety, should operate to discharge the surety, unless the so-called release is construed, by application of a fiction, to amount to a mere covenant not to sue, thus leaving the principal contract in force, but without any right of action upon it.

Price vs. Barker, 4 Ellis & Blackburn 760, *Coleridge, J.* (p. 776): "To entitle the plaintiff to our judgment, it must appear that the deed operated only as a covenant not to sue, and that the rights of the plaintiff as against the surety were preserved by the particular reservation in question, notwithstanding such covenant not to sue.

"With regard to the first question, two modes of construction are for consideration. One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and this subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the in-

tention to release and destroy the debt evinced by the general words of release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt. The other, that, according to the modern authorities, we are to mould and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving the rights against parties jointly liable: . . . and we think that we are bound by modern authorities to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release." *Nevill's Case*, 6 Ch. 43; *Ex parte Gifford*, 6 Ves. 805; *Bateson vs. Gosling*, L. R., 7 C. P. 9; *Rockville Bank vs. Holt*, 58 Conn. 526; 20 Atl. 669; *Mueller vs. Dobschuetz*, 89 Ill. 176; *Boatmen's Bank vs. Johnson*, 24 Mo. App. 316; *Brown vs. Vermont Mutual Fire Ins. Co.*, 83 Vt. 161; 74 Atl. 1061.

¹²⁸ *Jones vs. Ward*, 71 Wis. 152; 36 N. W. 711; *Moore vs. Paine*, 12 Wend. 123.

isor in suretyship will be discharged. Not merely because the promisor's right of indemnity is impaired but the collateral contract being executed with the intent of re-inforcing the main contract, partakes of its character, and is illegal.¹²⁹

Where the main contract is the result of duress practised by the creditor upon the principal, no recovery can be had against the surety or guarantor.¹³⁰

Also where the contract between the principal and creditor fails by reason of a want of consideration, the collateral suretyship contract also fails.¹³¹

If the principal contract is obtained by the fraud of the creditor, the accommodation party may avoid his undertaking.¹³²

If within the time allowed for the completion of a certain work the obligee makes it impossible for the contractor to perform the work there can be no recovery against the surety of the contractor.^{132a}

A judgment against the creditor in an action against the principal is conclusive against the creditor in a subsequent action against the surety or guarantor.¹³³

If the creditor having judgment against the surety, subsequently brings action against the principal, and fails to recover judgment, the surety may have the judgment against him set aside, since the principal liability has been extinguished by operation of law; and it is of no importance that the surety failed to plead a proper defense, or was negligent in asserting his rights; a subsequent adjudication in favor of the principal is under all circumstances available to the surety.¹³⁴

¹²⁹ *Swift vs. Beers*, 3 Denio 70; *Morse vs. Hovey*, 9 Paige 197; *Russell vs. Failor*, 1 O. S. 327; *Mound vs. Barker*, 71 Vt. 253; 44 Atl. 346.

¹³⁰ *Osborn vs. Robbins*, 36 N. Y. 365; Ante Sec. 14.

It is held that duress is a personal defense, and that duress of the principal will not avoid the obligations of a surety, unless the surety at the time of executing the obligation was ignorant of the circumstances which render it voidable by the principal. If the surety has knowledge of the duress, he knows that he has no remedy against the principal, and it is not therefore misled. *Hazard vs. Griswold*, 21 Fed. Rep. 178; *Graham vs. Marks*, 98 Ga. 67; 25 S. E. 931.

¹³¹ *Sawyer vs. Chambers*, 43 Barb. 622; *Scroggin vs. Holland*, 16 Mo. 419; *Gunnis vs. Weigley*, 114 Pa. 191; 6 Atl. 465.

¹³² *Putnam vs. Schuyler*, 4 Hun 166; *Bryant vs. Crosby*, 36 Me. 562; *Parshall vs. Lamoreaux*, 37 Barb. 189.

^{132a} *People of Porto Rico vs. Title Guaranty & Surety Co.*, 227 U. S. 382; *Hubbard vs. Reilly*, 98 N. E. 886, 51 Ind. App. 19.

¹³³ *State vs. Parker*, 72 Ala. 181; *Baker vs. Merriam*, 97 Ind. 539; *State vs. Coste*, 36 Mo. 437; *Stoops vs. Wittler*, 1 Mo. App. 420; *Brown vs. Bradford*, 30 Ga. 927; *Crim vs. Wilson*, 61 Miss. 233; *Gill vs. Morris*, 11 Heisk. 614.

¹³⁴ *Ames vs. Maclay*, 14 Ia. 281;

§104. Same subject — In cases where the release by operation of law is not the result of the fault or procurement of the creditor.

If the defense of the principal is personal, and disconnected with any act or fault of the creditor, the liability of the surety or guarantor is not impaired.

If the principal is incapacitated by reason of coverture, such defense is not available to the promisor in suretyship¹³⁵ and this seems to be the rule whether the promisor has knowledge of such incapacity at the time he signs or not.

If the principal is insane at the time of the execution of the main contract, and the creditor has no knowledge of the incapacity, it constitutes a personal defense available only to the principal.¹³⁶ But if the principal is incapacitated by insanity after the execution of the contract, and before default, it is held to discharge the surety.¹³⁷

The same rule is applied where the principal is an infant; the surety or guarantor is presumed to have contracted against such disability, and this defense can only be set up by the infant himself,¹³⁸ except in cases where the infant disaffirms the con-

Norris vs. Pollard, 75 Ga. 358; Dickason vs. Bell, 13 La. Ann. 249; Miller vs. Gaskins, Sm. & M. Ch. (Miss.) 524.

¹³⁵ Winn vs. Sanford, 145 Mass. 302; 14 N. E. 119, *Devens, J.*: "It is true, as a general proposition, that the liability of a guarantor or of a surety is limited by that of his principal. But to this there are certain exceptions. Thus, where the principal is excused from liability for reasons personal to himself, and which do not affect the debt he has incurred or the promise he has made, the surety would not be entitled to the benefit of this excuse. In such case, he is, in a certain sense, an independent promisor, and must perform his promise."

Kimball vs. Newell, 7 Hill 116; Erwin vs. Downs, 15 N. Y. 576; Da-

vis vs. Statts, 43 Ind. 103; Whitworth vs. Carter, 43 Miss. 61; Lobaugh vs. Thompson, 74 Mo. 600; Allen vs. Berryhill, 27 Ia. 534; Weed Sew. Mach. Co. vs. Maxwell, 63 Mo. 486; Wiggins' Appeal, 100 Pa. 155; Davis vs. Commissioners, 72 N. C. 441; St. Albans Bank vs. Dillon, 30 Vt. 122; Gates vs. Tebbetts, 83 Neb. 573; 119 N. W. 1120.

¹³⁶ Lee vs. Yandell, 69 Tex. 34; 6 S. W. 665.

¹³⁷ Grove vs. Johnstone, L. R. 24 Ir. 352; Fuller vs. Davis, 1 Gray 612.

In this case the principal gave bond for his appearance on a criminal charge and afterwards became insane and was committed to a lunatic asylum, and the surety upon the bail bond was discharged.

But see Adler vs. State, 35 Ark. 517.

¹³⁸ Kuns vs. Young, 34 Pa. 60; Baker vs. Kennett, 54 Mo. 82.

tract, and the consideration is restored to the creditor.^{138a}

Where the main contract is *ultra vires*, and on that account void, and a third party signs as surety or guarantor, with knowledge of the character of the principal contract, he will be bound.¹³⁹ One guaranteeing the debt of a corporation cannot defend on the ground of usury, if, by statute, the corporation can not do so.^{139a}

If the contract between the principal and the creditor is incomplete, and on that account is declared invalid, the surety who has knowledge, or means of knowing of such infirmity in the contract at the time he signs, will be liable. Such a case would be where a partner signs a firm name without authority, or one of several joint obligors fails to sign.¹⁴⁰

§105. Suretyship obligations obtained by fraud of the creditor.

A promisor in suretyship may avoid his contract for a fraudulent misrepresentation of facts by the creditor, by which he was induced to make the contract.¹⁴¹

It is not necessary that the creditor have knowledge of the falsity of the representation which he makes. It is the falsity of the statement, not the motive of the creditor, which has injured the surety.^{141a}

Secret stipulations entered into between the creditor and principal, of which the promisor has no knowledge, and which make the real contract different from that which it purported to be, are a fraud upon the surety or guarantor. Thus the principal was indebted to the creditor, and purchased with another as guarantor, merchandise from the creditor, at a price higher than the market price, with the understanding that the excess above the market price, was to be applied to the discharge of the old debt. This arrangement, not communicated to the

^{138a} Keokuk County Bank vs. Hall, 106 Iowa 540; 82 N. W. 552.

¹³⁹ Yorkshire Railway Wagon Co. vs. Maclure, L. R., 19 Ch. 478; Weare vs. Sawyer, 44 N. H. 198; Mason vs. Nichols, 22 Wis. 360; Holm vs. Jamieson, 173 Ill. 295; 50 N. E. 702.

^{139a} Salvin vs. Myles Realty Co., 227 N. Y. 51; 124 N. E. 94.

¹⁴⁰ McLaughlin vs. McGovern, 34 Barb. 208; Sterns vs. Marks, 35 Barb. 565; Russell vs. Annable, 109

Mass. 72, dissenting opinion, Wells, J.; Stewart vs. Behm, 2 Watts. 356 (Semble).

¹⁴¹ Allen vs. Houlden, 6 Beav. 148; Evans vs. Keeland, 9 Ala. 42; Fishburn vs. Jones, 37 Ind. 119; Fenter vs. Obaugh, 17 Ark. 71; Marchman v. Robertson, 77 Ga. 40; Waterbury vs. Andrews, 67 Mich. 281; 34 N. W. 575; *ante*, Sec. 15.

^{141a} Bank vs. Richmond, 235 Mo. 532; 139 S. W. 352.

guarantor, was held to be a fraud, for which he was entitled to be released.¹⁴²

Again the creditor represented to the surety that the debt had been compromised, and that the note which the surety signed, was in full settlement, whereas, the principal was, by the terms of settlement, required to give his unsecured note for an additional amount. This was considered a fraud upon the surety, since the inducement to his contract was the benefit he supposed he was to confer on the principal by enabling him to compromise his debt.¹⁴³

The surety has the right to insist that the principal receive the precise benefit which the creditor stipulated that he should receive, and the contract may be avoided by any wilful deceit practiced upon the surety in this respect. It is not sufficient to show that the benefit to the principal in the contract which was made, was equal in value to that which the creditor stipulated, but if the surety has been induced by deceit to enter into a bargain which he did not intend, he need not stand by it.¹⁴⁴

¹⁴² *Pidcock vs. Bishop*, 3 Barn. & Cr. 605.

¹⁴³ *Weed vs. Bentley*, 6 Hill 56; *Pendlebury vs. Walker*, 4 Younge & C. Ex. 424.

Powers Dry Goods Co. vs. Harlin, 68 Minn. 193; 71 N. W. 16. In this case the principal made settlement with his creditors for a composition at 33 1-3 per cent., and with one of the creditors he made a secret agreement to pay a larger sum. The surety upon the note of the creditor making this secret arrangement, was held to be discharged. The Court said: "The object of that agreement was to release the debtors from a portion of their indebtedness, and the sureties entered into their contract for this purpose, induced so to do by the representations and belief that the debtors were to be freed and released from any further liability. In this they were deceived, and through the concealment of the plaintiff, payee of the notes, the object was not attained. By reason

of the fraud it was within the power of innocent creditors to ignore the composition, and recover the balance due upon their claims. The ability of the debtors to meet their notes or to indemnify the sureties was hazarded and impaired at once by the contingency."

But see *Mead vs. Merrill*, 30 N. H. 472; *Booth vs. Storrs*, 75 Ill. 438.

¹⁴⁴ *Trammell vs. Swan*, 25 Tex. 473; *Ham vs. Greve*, 34 Ind. 18; *Haworth vs. Crosby*, 120 Iowa 612; 94 N. W. 1098; *Machin vs. Prudential Trust Co.*, 210 Pa. 253; 59 Atl. 1073; *Atlantic Trust & Deposit Co. vs. Union Trust Co.*, 110 Va. 286; 67 S. E. 182; *Ward vs. National Surety Co.*, 152 S. W. 397; 167 S. W. 579.

In this case the surety was induced to sign the note on the representation that it was in payment for goods then being sold to the principal, but in fact, it was in settlement of a pre-existing debt.

§106. Same subject — Concealment or non-disclosure of facts by the creditor.

A concealment or suppression of material facts which affect the risk of the promisor will amount to fraud and constitute a defense to the suretyship promise. The law requires good faith on the part of the beneficiary of the contract, and it is the duty of the creditor to disclose information which he has concerning the principal which, if known to the promisor, would prevent him from entering into the contract.¹⁴⁵

If the creditor is applied to for information, or if the circumstances are such that the promisor is in a relation of confidence with the creditor, a failure to disclose everything within his knowledge, that is material for the promisor to know, is equivalent to an affirmative misrepresentation.¹⁴⁶ It is not necessary to show that the concealment or failure to disclose facts material for the surety to know is wilful, or with intent to deceive.¹⁴⁷ It is sufficient if the non-disclosure is construc-

¹⁴⁵ Ante Sec. 15.

¹⁴⁶ *Bank vs. Anderson*, 65 Ia. 692; 22 N. W. 929; *Remington Sew. Mach. Co. vs. Kezertee*, 49 Wis. 409; 5 N. W. 809; *Harrison vs. Lumbermen Ins. Co.*, 8 Mo. App. 37; *Barnes vs. Century Savings Bank*, 128 N. W. 541; 149 Ia. 367; *Putney vs. Schmidt*, 120 Pac. 720; 16 N. M. 400; *Lauer Brewing Co. vs. Riley*, 195 Pa. 449; 46 Atl. 71; *Damon vs. Empire State Surety Co.*, 161 App. Div. 875.

Benton Co. Bank vs. Boddicker, 105 Ia. 548; 75 N. W. 632, *Robinson, J.*: "The contract of suretyship is, as a rule, for the benefit of the creditor, he is, in dealing with the surety, to observe the utmost good faith, and if he fail to do so, without a sufficient excuse for his neglect, the surety will be discharged to the extent to which he suffers by reason of the lack of good faith on the part of the creditor. If the surety applies to the creditor for information respecting the principal which the creditor has, and may

properly give, but which he withholds without sufficient cause, or if he knowingly give false information, he, and not the surety should suffer the loss occasioned by the wrong."

¹⁴⁷ *Railton vs. Mathews*, 10 Clark & Fin. 934, *Lord Campbell*: "If the defenders (creditor) had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another, I apprehend is wholly immaterial. It certainly is wholly immaterial to the interest of the surety, because to say that his obligations shall depend upon that which was passing in the mind of the party requiring the bond appears to me preposterous; for that would make the obligations of the surety depend on whether the other party had a good memory, or whether he was a person of good

tively fraudulent, and the preponderance of authority establishes such fraud from the mere failure to disclose material facts.¹⁴⁸

The creditor can not avoid his duty in this respect, by maintaining an opinion that the undisclosed facts were not material, any more than a surety could be released because he was willing to say that he considers the undisclosed facts material, and would not have signed had he known the facts. In both cases, the question of materiality is to be adjudicated and not merely asserted by the parties.

sense, or whether he had the motive in his mind, or whether he was aware that those facts ought to be disclosed. The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not upon what was passing in the mind of the other party, or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial." *Fidelity & Deposit Co. vs. Moshier*, 151 Fed. 806; *London General Omnibus Co. vs. Holloway*, 2 K. E. 72 (1912).

¹⁴⁸ *Bellevue Loan & Bldg. Ass'n vs. Jeckel*, 46 S. W. Rep. (Ky.) 482; *Dinsmore vs. Tidball*, 34 O. S. 411; *Wells, Fargo & Co. vs. Walker*, 9 N. M. 456; *Conn. Life Ins. Co. vs. Chase*, 72 Vt. 176; 47 Atl. 825; *Wilson vs. Monticello*, 85 Ind. 10; *Fassnacht vs. Emsing Gagen Co.*, 18 Ind. App. 80; *Traders' Ins. Co. vs. Herber*, 67 Minn. 106; 69 N. W. 701; *Denton vs. Butler*, 99 Ga. 264; 25 S. E. 624; *Third Nat'l Bank vs. Owen*, 101 Mo. 558; 14 S. W. 632; *Fire, etc., Assurance Co. vs. Thompson*, 68 Cal. 208; 9 Pac. 1; *Indiana & Ohio Live Stock Ins. Co. vs. Bender*, 32 Ind. App. 287; 69 N. E. 691; *Damon vs. Empire State Surety Co.*, 161 App. Div. (N. Y.) 875; *Cooper Process Co. vs. Chicago Bonding & Surety Co.*, 262 Fed. 66; 8 A. L. R. 1477, 1485, annotated note.

Contra—*Lake vs. Thomas*, 84 Md. 608; 36 Atl. 437.

Hamilton vs. Watson, 12 Clark & Fin. 109, *Lord Campbell*: "If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept; whether the debtor was in the habit of overdrawing; whether he was punctual in his dealings; whether he performed his promises in an honorable manner—for all these things are extremely material for the surety to know. But unless the questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure."

North British Ins. Co. vs. Lloyd, 10 Exch. 523, holding that the requirement of disclosure without inquiry incident to contracts of insurance does not apply to contracts in suretyship, distinctly rejecting the doctrine in this respect announced in *Owen vs. Homan*, 3 Mac. & G. 378; *Davies vs. London & P. Marine Ins. Co.*, L. R., 8 Ch. Div. 469; *Magee vs. Manhattan Life Ins. Co.*, 92 U. S. 93; *San Francisco vs. Staude*, 92 Cal. 560; 28 Pac. 778.

A non-disclosure of the insolvency of the principal, is generally held not to amount to a fraud. *Ham vs. Greve*, 34 Ind. 18; *Farmers Bank vs. Braden*, 145 Pa. 473; 22 Atl. 1045.

The surety or guarantor will not be discharged, however, if the undisclosed facts were not known to the creditor. Fraud will not be imputed because the creditor by reason of negligence or inattention to his own affairs, does not know of the facts which materially affect the surety risk.¹⁴⁹

It has been held that where the facts are known to the creditor, and materially affect the risk of the promisor, that the creditor can not evade his duty of disclosure, merely by showing that the suretyship promise was solicited by the principal, and that the creditor had no communication with the promisor, and that no opportunity for disclosure was afforded. The acceptance of the promise under such circumstances, is considered as an implied misrepresentation that only the ordinary risks of suretyship were being assumed.¹⁵⁰

¹⁴⁹ *Lieberman vs. First Nat'l Bank*, 40 Atl. Rep. 382; *Tapley vs. Martin*, 116 Mass. 275; *Franklin Bank vs. Stephens*, 39 Me. 532; *Farmington vs. Stanley*, 60 Me. 472; *Wayne vs. Bank*, 52 Pa. 343; *Anaheim Co. vs. Parker*, 101 Cal. 483; 35 Pac. 1048; *Bowne vs. Mt. Holly Bank*, 45 N. J. 360; *Savings Bank vs. Albee*, 63 N. H. 163; *Hudson vs. Miles*, 185 Mass. 582; 71 N. E. 63; *Brillion Lumber Co. vs. Barnard*, 131 Wis. 284; 111 N. W. 483.

But see *Graves vs. Bank*, 10 Bush (Ky.) 23.

¹⁵⁰ *Lee vs. Jones*, 17 C. B. (N. S.) 482; distinguishing *Hamilton vs. Watson*, and *North British Ins. Co. vs. Lloyd*, *Ubi Supra*. In this case the bond was arranged for by the principal. The surety had no communication with the creditors. The form of the bond was prepared by the creditors, and it recited that the principal had been for some time in their employ, and that they had required him to give a bond as a condition of continuing in their employ. The creditors sent a messenger to receive the bond who had no authority to make disclosures or answer inquiries. The principal was in default for a large amount at the time the bond was executed as was well known to the creditors. These circumstances were held to constitute a fraud by the creditors on the surety.

Blackburn, J.: "I think that great practical mischief would ensue if the creditor were by law required to disclose everything material known to

him, as in a case of insurance. If it were so, no creditor could rely upon a contract of guarantee unless he communicated to the proposed sureties everything relating to his dealings with the principal, to an extent which would in the ordinary course of things be so vexatious and annoying to the principal and his friends, the intended sureties, that such a rule of law would practically prohibit the obtaining of contracts of suretyship in matters of business. This is well pointed out by Lord Campbell in his judgment in *Hamilton vs. Watson*. But I think, both on authority and on principle, that, when the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties to the transaction such as that described, and, if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him, he would not enter into the contract of suretyship, I think it is evidence of fraudulent representation on his part. . . . In the present case, the plaintiffs had no personal com-

In the absence of specific inquiries no duty rests upon the creditor to disclose what he knows concerning the irregularity of the principal in his conduct growing out of other transactions than the one which is the subject of the suretyship.¹⁵¹

Unauthorized statements made to the surety by agents of the creditor which induce the surety to sign the bond will not bind the creditor in the absence of any ratification by the creditor.^{151a}

munication with the defendant, the surety; and when they sent the agreement to him for execution, they sent it by an agent who had no authority from the plaintiffs to make any statement whatever, or to do anything more than obtain the defendant's signature to the agreement thus sent.

"The argument for the plaintiffs before us was, in substance, that, under such circumstances, though there might be a concealment or non-disclosure of material facts, there was not and could not be any misrepresentation on the plaintiffs' part; and that, without it, there could be no fraud. . . . Now, whether the handing the agreement by the plaintiffs to the defendant amounted to an inaccurate representation or not, depends, as I think, on the question whether in such a transaction as that described in the agreement, it might or might not naturally be expected that the masters might have allowed a balance of this extent to accumulate, and might have allowed the account to stand over unsettled for so long a time. . . . The improbability that anyone could suppose that sureties would have entered into such an agreement if they had known the truth, is so great that the jury might well think that the plaintiffs knew that the defendant was in ignorance of it."

See also *Sooy vs. State of New Jersey*, 39 N. J. L. 135, where a bond of the Treasurer of the State was accepted, without any communication between the parties, except that the State furnished the form of bond. The fact of previous defalcations being known to the State, it was held to be a fraud not to disclose this to the surety, and it is placed upon the ground that the continuance of the Treasurer in office amounts to a tacit assertion by

the State that his past conduct was regular, and that on this account, the silence of the State was equivalent to deceit.

But see *Cawley vs. People*, 95 Ill. 249; *Aetna Co. vs. Mabbett*, 18 Wis. 698.

In *Julius Winter & Co. vs. Forrest*, 145 Ky. 581; 140 S. W. 1005, *Lassing, J.*: "Clearly, if the obligee had nothing whatever to do with the execution of the bond, and the surety was induced by the employe alone to sign the bond, without the knowledge of his principal and in the absence of the principal, it would be a manifest injustice to hold the bond invalid as to the surety because the principal had not disclosed to him such facts as he may have known bearing upon the employe's honesty and integrity, for no opportunity was given to him to make such disclosure. In such case, if the surety wants the protection of the law, he must give to the obligee an opportunity to make disclosures relative to any fact touching his employe's honesty, reliability, etc., within his knowledge, and until such opportunity is given it must be presumed, and conclusively presumed, that the surety is satisfied to act upon his own initiative, or such information as the obligor gives him; and in such cases the surety may not escape liability on the ground that the obligee failed to disclose to him information possessed by the obligee at the time, which if given, would have increased the risk of the surety and possibly prevented him from signing the bond."

¹⁵¹ *Bostwick vs. Van Voorhis*, 91 N. Y. 353; *Screwmen vs. Smith*, 70 Tex. 168; 7 S. W. 793; *Home Ins. Co. vs. Holway*, 55 Ia. 571; 8 N. W. 457.

^{151a} *Ida County Sav. Bank vs. Seidensticker*, 92 N. W. 863; 128 Ia. 54; *Watertown Sav. Bank vs.*

§107. Discharge of promisor by failure to disclose facts coming to the knowledge of the creditor, after the execution of the contract.

The requirement of good faith continues after the execution of the contract, and the creditor owes a duty to the promisor, in a continuing or executory contract of suretyship, to disclose to him such acts of the principal, as materially affect the promisor's risk, and for which, the creditor himself might put an end to the main contract.

Such duty of disclosure rests upon the theory, that the creditor who receives advancements from the principal on the credit of a guarantor, or continues the principal in his service for whose honesty another has become surety, with knowledge that the principal has violated his agreement or is unworthy of trust, actively conspires to assist the principal in committing a default, and that such conduct contains the same elements of fraud as the concealment of similar facts at the time of the execution of the contract.¹⁵²

This rule, however, can not be applied without manifest injustice, except in those cases where the default is such that the creditor can put an end to the contract, and so avoid loss incident to future advancements, or a further continuance of the principal in his service.

Where there is a continuing guaranty for future delivery of merchandise, if the principal becomes insolvent, the creditor can not on that account refuse to ship the goods, since the inability of a party to perform his contract, in the absence of fraud, is not a ground for rescission, and a failure to disclose these facts to the guarantor, violates no implied duty, as

Mattoon, 78 Conn. 388; 62 Atl. 622; see also *Hogue vs. State*, 28 Ind. App. 285; 62 N. E. 656; *American Ins. Co. vs. Pauley*, 170 U. S. 133; *Sherman vs. Harbin*, 125 Iowa 174; 100 N. W. 629; *Sewell vs. Breathitt Lodge*, 150 Ky. 542; 150 S. W. 677.

¹⁵² *Phillips vs. Foxall*, L. R., 7 Q. B. 666; *Sanderson vs. Aston*, L. R., 8 Exch. 73; *Enright vs. Falvey*,

L. R., 4 Ir. 397; *Conn. Insurance Co. vs. Scott*, 81 Ky. 540; *Roberts vs. Donovan*, 70 Cal. 108; 9 Pac. 180; 11 Pac. 599; *Saint vs. Wheeler*, 95 Ala. 362; 10 South. 539; *Rapp vs. Phoenix Co.*, 113 Ill. 390; *Hebert vs. Lee*, 118 Tenn. 133; 101 S. W. 175; *Hartford Ins. Co. vs. Casey*, 196 Mo. App. 291; 191 S. W. 1072.

But see *Pittsburg, etc., Ry. Co. vs. Schaeffer*, 59 Pa. 350.

the creditor is not obliged to use any such diligence in taking care of the interests of the guarantor.

While such information would be useful to the promisor in enabling him to watch the affairs of the principal, yet, the duty of disclosing these facts, can rest upon no other basis than that of the giving of notice to the promisor of non-payment at maturity, which can only be required where the contract, either expressly or by implication, so recites.¹⁵³

Neither should the creditor be required to give notice to the promisor of a mere breach of contract on the part of the principal, although such conduct might materially affect the risk. Thus an agent of an Insurance Co. gave bond that he would perform his duties as such agent as required by the by-laws of the Company. One of the by-laws provided that he should pay each month the balance due the Company, and it was held that the Company owed no duty to the surety to disclose the default of the Agent in failing to pay over the balances from month to month, where no fraud or dishonesty by the agent was shown, even though the default of the agent was of such a character as to authorize his discharge by the Company.¹⁵⁴

The surety upon such a bond would be liable for a default occasioned by sickness or accident or any other merely casual circumstances, yet the creditor loses none of his rights against the surety by indulging the principal in such default to the end of his contract, and omitting notice to the promisor of the defaults as they occur.¹⁵⁵

If the acts of fraud or dishonesty by the principal, are not known to the creditor, the duty of disclosure does not apply even though the creditor, by the exercise of ordinary diligence,

¹⁵³ Ante Sec. 69.

¹⁵⁴ Watertown Fire Ins. Co. vs. Simmons, 131 Mass. 85.

But see Morrison vs. Arons, 65 Minn. 321; 68 N. W. 33; Fidelity Mutual Life Assn. vs. Dewey, 54 L. R. A. 945 (Minn.).

¹⁵⁵ McKecknie vs. Ward, 58 N. Y. 541; Atlantic & Pacific Telegraph Co. vs. Barnes, 64 N. Y. 385.

See also *Ætna Co. vs. Fowler*, 108 Mich. 557; 66 N. W. 470; *Lancashire Co. vs. Callahan*, 68 Minn. 277; 71 N. W. 261; *Charlotte R. R. Co. vs. Gow*, 59 Ga. 685; *Wilkerson vs. Crescent Co.*, 64 Ark. 80; 40 S. W. 465; *Phoenix Ins. Co. vs. Findley*, 59 Ia. 591; 13 N. W. 738; *Wilmington R. R. Co. vs. Ling*, 18 S. C. 116.

might have discovered the default. Such diligence need not be exercised in the interest of the surety or guarantor.¹⁵⁶

The promisor will not be discharged because the creditor conceals from him misconduct of the principal which is not directly connected with the subject matter of the suretyship.¹⁵⁷

§108. Fraud and misconduct of the principal.

A suretyship contract induced by the fraud of the principal is nevertheless valid as against the promisor in all cases in which the creditor has no knowledge of the fraud, and has not by his own conduct assisted in perpetrating the fraud.¹⁵⁸

Many cases have arisen in which a surety has refused to sign unless another will sign as co-surety, and the principal, to induce the making of the contract, forges the name of the co-surety. Two theories have obtained respecting the liability of the surety under these circumstances.

One, that it is the duty of the creditor not to accept an obligation without such investigation as will disclose whether the signatures are genuine, that the surety signs upon the implied condition that no advancements will be made unless the contract is in fact what it purports to be, the valid obligation of all the parties, and that a creditor has no right to remain in passive ignorance as to the character of the contract he is accepting.¹⁵⁹

The other, and by far the most generally accepted theory, and the one supported by the most satisfactory reasoning, is, that whether the signing by the surety is before or after the

¹⁵⁶ *Newark vs. Stout*, 52 N. J. L. 35; *Frelinghuysen vs. Baldwin*, 16 Fed. Rep. 452; *Phillips vs. Bossard*, 35 Fed. Rep. 99; *Atlas Bank vs. Brownell*, 9 R. I. 168.

¹⁵⁷ *LaRose vs. Logansport Bank*, 102 Ind. 332; 1 N. E. 805. In this case the creditor is shown to have had knowledge of the excessive intemperance of the principal, which was the approximate cause of his defalcations.

¹⁵⁸ Ante Sec. 74, Note 8.

Contra—*W. T. Raleigh Medical Co. vs. Wilson*, 60 So. 1001.

¹⁵⁹ *Sharp vs. Allgood*, 100 Ala. 183; 14 South. 16; *Cornell vs. The People*, 37 Ill. App. 490; *Southern Cotton Oil Co. vs. Bass*, 126 Ala. 343; 28 So. 576; *Stone vs. Goldberg & Lewis*, 6 Ala. App. 249, 60 So. 744. In these cases the surety signed after the forgery. A much stronger case would seem to be made where the surety signs before the forgery, and so avoid the same charge of negligence imputed to the creditor.

forgery, the paper comes to the creditor bearing a stamp of trust and confidence by the Surety in the principal, and the creditor should not suffer because of a breach of this confidence, but the loss should rather fall upon the one who held out the principal as worthy of trust.¹⁶⁰

A misrepresentation made to the promisor by the principal cannot prevail against the creditor who parts with a consideration in good faith, relying upon the surety, and without knowledge of the fraud. The creditor is not bound to investigate each transaction and ascertain whether the surety or guarantor has been deceived.¹⁶¹

If false representations are made by a third person without the knowledge or procurement of the creditor, the promisor is not thereby released.¹⁶²

§109. Misconduct of the principal, by delivering suretyship obligations without complying with conditions.

A creditor making advances in good faith, cannot be held responsible for a breach, by the principal, of conditions imposed by the surety or guarantor, not communicated to the creditor.^{162a}

If a creditor accepts a contract upon which there is one surety, he cannot be deprived of his security because the surety signed upon the condition, expressed to the principal alone,

¹⁶⁰ Stoner vs. Millikin, 85 Ill. 218; Stern vs. People, 102 Ill. 540; Wayne Co. vs. Cardwell, 73 Ind. 555; State vs. Hewitt, 72 Mo. 603; Veach vs. Rice, 131 U. S. 293; 9 S. Ct. 730; Chase vs. Hawthorn, 61 Me. 505; Kansas City Terra Cotta Lumber Co. vs. Murphy, 49 Neb. 674; 68 N. W. 1030; Vass vs. Riddick, 89 N. C. 6; Loew vs. Stocker, 68 Pa. 226.

¹⁶¹ Marks vs. First Nat'l Bank, 79 Ala. 550; Ladd vs. Board, 80 Ill. 233; Davis Co. vs. Buckles, 89 Ill. 237; Lucas vs. Owens, 113 Ind. 521; 16 N. E. 196; Martin vs. Campbell, 120 Mass. 126; Page vs. Krekey, 137 N. Y. 307; 33 N. E. 311; Johnston vs. Patterson, 114 Pa. 398; 6 Atl. 746; Kulp vs. Brant, 162 Pa. 222; 29 Atl. 729; Quinn vs. Hard, 43 Vt. 375; Gromberg vs. Fidelity & Deposit Co., 139 Ala. 338; 36 So. 622; Hudson vs. Miles, 185 Mass. 582; 71 N. E. 63; Ripley Bldg. Co. vs. Coors, 37 Col. 78; 84 Pac. 817; Wheeler

vs. Trader's Deposit Bank, 55 S. W. 552; 107 Ky. 653; Sewell vs. Breathitt Lodge, 150 Ky. 542; 150 S. W. 677; Saginaw Medicine Co. vs. Batey, 179 Mich. 651.

Bank of Australasia vs. Reynell, 10 New Zealand L. R. 257. In this case the guarantor was told by the principal that the letter of credit was for £500, and the guarantor signed without reading, relying upon the statement of the principal. The letter of credit was for £5,000, and the creditor made advancement of the full amount without knowledge of the fraud. Held, that the guarantor was liable.

¹⁶² Lumber Co. vs. Buchtel, 101 U. S. 638; Brown vs. Davenport, 76 Ga. 799; Sewell vs. Breathitt Lodge, 150 Ky. 542; 150 S. W. 677.

^{162a} Seitz Brewing Co. vs. Ayres, 60 N. J. E. 190; 46 Atl. 535; Gritman vs. U. S. F. & G. Co., 41 Wash. 77; 83 Pac. 6.

that the obligation should not be delivered until another had signed as co-surety. The estoppel against the promisor is clear; he should not be heard to assert a defense which works an injury to another, and which is based upon his own neglect in failing to communicate the condition to the creditor.¹⁶³

Against this view has been urged a somewhat technical application of the doctrine of Special Agency, with the conclusion, that since the surety authorizes the principal to make delivery of the paper only on condition, and is a special agent, he can not bind his principal, the promisor, except within the strict terms of his agency.¹⁶⁴

If the body of the bond or other instrument contains the names of co-obligors whose names do not appear as signers, such circumstance is considered sufficient to put upon the creditor the burden of ascertaining whether the instrument is delivered in accordance with the understanding of the promisor.¹⁶⁵

¹⁶³ *Dair vs. United States*, 16 Wall. 1; *Tidball vs. Halley*, 48 Cal. 610; *Ward vs. Hackett*, 30 Minn. 150; 14 N. W. 578; *Mathis vs. Morgan*, 72 Ga. 517; *Rhode vs. McLean*, 101 Ill. 467; *Mowbray vs. State*, 88 Ind. 324; *Gibbs v. Johnson*, 63 Mich. 671; 30 N. W. 343; *State vs. Churchill*, 48 Ark. 426; 3 S. W. 352, 880; *Lewiston vs. Gagne*, 89 Me. 395; 36 Atl. 629; *Micklewait vs. Noel*, 69 Ia. 344; 28 N. W. 630; *North Atchison Bank vs. Gay*, 114 Mo. 203; 21 S. W. 479; *Brumback vs. German Bank*, 46 Neb. 540; 65 N. W. 198; *Russell vs. Freer*, 56 N. Y. 67; *Vass vs. Riddick*, 89 N. C. 6; *Whitaker vs. Richards*, 134 Pa. 191; 19 Atl. 501; *Dun vs. Garrett*, 93 Tenn. 650; 27 S. W. 1011; *Ballow vs. Wichita Co.*, 74 Tex. 339; 12 S. W. 48; *Belden vs. Hurlbut*, 94 Wis. 562; 69 N. W. 357; *Fuller vs. Dupont*, 183 Mass. 596; 66 N. E. 672; *Baker County vs. Huntington*, 46 Or. 275; 79 Pac. 187; *Cowan vs. Roberts*, 134 N. C. 415; 46 S. E. 979; *Hendry vs. Cartwright*, 89 Pac. 309; *Williams vs. Morris*, 138 S. W. 464; 99 Ark. 319.

Contra—*Johnston vs. Cole*, 102 Ia. 109; 71 N. W. 195.

It has been held that the delivery of the obligation by a stranger who holds it in escrow, and in violation of his trust, will bind the promisor, if the creditor accepts the same in good faith. *Taylor Co. vs. King*, 73 Ia. 153; 34 N. W. 774; *McCormick Co. vs. McKee*, 51 Mich. 426; 16 N. W. 796.

¹⁶⁴ *People vs. Bostwick*, 32 N. Y. 445; *King vs. State*, 81 Ala. 92; 8 South. 159; *Evans vs. Daughtry*, 84 Ala. 68; 4 South. 592; *State vs. Allen*, 69 Miss. 508; 10 South. 473; *W. T. Raleigh Medical Co. vs. Wilson*, 60 So. 1001.

¹⁶⁵ *Pawling vs. United States*, 4 Cranch 219; *Allen vs. Marney*, 65 Ind. 398; *Hessell vs. Johnson*, 63 Mich. 623; 30 N. W. 209; *Ward vs. Churn*, 18 Grat. 801; *Baker County vs. Huntington*, 46 Or. 275; 79 Pac. 187.

Contra—*Grim vs. Jackson Tp.*, 51 Pa. 219.

See also *Whitaker vs. Richards*, 134 Pa. 191; 19 Atl. 501; *Johnson vs. Weatherwax*, 9 Kan. 75.

When the names of the co-obli-

If the promisor delivers to the principal the obligation in an incomplete form, with authority to him to complete the instrument, he will be bound, even though the blanks are not filled in accordance with his directions.¹⁶⁶

In the absence of express authority it is held that the doctrine of implied agency does not reach the amount of the penalty in the bond, and such blanks being filled by the principal, will not bind the surety.¹⁶⁷

gors appear in the body of the bond, but not as signers, but the bond was delivered without any condition that the others would sign. Held, not a defense.

¹⁶⁶ *Butler vs. United States*, 21 Wall. 272; *White vs. Duggan*, 140 Mass. 18; 2 Atl. 110; *Lee Co. vs. Welsing*, 70 Ia. 198; 30 N. W. 481; *Rose vs. Douglass Twp.* 52 Kas. 451; 34 Pac. 1046; *Greene Co. vs. White*, 29 Mo. App. 459; *South Berwick vs. Huntress*, 53 Me. 89; *Wesell vs. Glenn*, 108 Pa. 104.

Fullerton vs. Sturges, 4 O. S. 529, *Ranney, J.*: "No rule is better settled, or founded upon stronger reasons, than that which affirms the liability of one intrusting his name in blank to another, to the full extent to which such other may see fit to bind him, when the paper is taken in good faith and without notice, actual or implied, that the authority given has been exceeded, or the confidence reposed has been abused. It has the effect of a general letter of credit; and the rule is founded, not only upon the principle of general jurisprudence which casts the loss, when one of two equally innocent persons must suffer, upon him who has put it in the power of another to do the

injury, but also upon that rule of the law of agency, which makes the principal liable for the acts of his agent, notwithstanding his private instructions have been disregarded, when he has held the agent out as possessing a more enlarged authority. These rules are indispensably necessary to prevent fraud and surprise upon third persons, and in their application to the usual course of dealing in commercial transactions, are to be considered as of vital importance."

The earlier cases in Ohio held that instruments under seal, delivered in an incomplete form, could not be completed except in pursuance of a written authority, also under seal. *Ayres vs. Harness*, 1 O. 368; *State vs. Boring*, 15 O. 507.

But private seals were abolished in Ohio in 1884.

See also *Penn vs. Hamlett*, 27 Gratt. 337; *Cross vs. State Bank*, 5 Ark. 525.

¹⁶⁷ *Famulener vs. Anderson*, 15 O. S. 473; *Rhea vs. Gibson*, 10 Gratt. 215. A fortiori when filled by the creditor. *Spring Garden Ins. Co. vs. Lemmon*, 117 Iowa 691; 86 N. W. 35.

See also *Preston vs. Hull*, 23 Gratt. 600, where the same rule was applied, where a blank for the name of the obligee was filled by the principal.

§110. Suretyship contracts made in reliance upon promises of the creditor.

Fraud cannot be predicated upon a misrepresentation of things not in existence; only present or past transactions can be the subject of fraudulent misrepresentation. A promise or stipulation by the creditor that certain things will be done by himself or others, or that certain facts will exist, where the doing of these things is not made a condition of the contract, can not be set up as a basis of defense by the Surety or Guarantor, even though the contract is made in reliance upon the promise or stipulation.

In a legal sense, it is not fraudulent to promise to do a thing, even without any intent of fulfilling the promise.¹⁶⁸

A promise, however, to do a thing, or that certain facts will exist in the future, may be fraudulent, if the happening of such event is known to the party promising as being impossible, or where from his position, or opportunities for information, he is presumed to know what he promises cannot take place. Such misrepresentation although relating to future events will amount to deceit, and will be actionable as a basis for rescission of contract.¹⁶⁹ The same rule applies to suretyship contracts.

Where the creditor represented that the accounts of the principal would be audited every two weeks, and the surety signed the bond in reliance that he would have the benefit of

¹⁶⁸ *People vs. Healy*, 128 Ill. 9; 20 N. E. 692; *Kitson vs. Farwell*, 132 Ill. 327; 23 N. E. 1024; *Casselberry vs. Warren*, 40 Ill. App. 626; *Gallager vs. Brunel*, 6 Cowen 346; *Sheldon vs. Davidson*, 85 Wis. 138; 55 N. W. 161; *Warner vs. Benjamin*, 89 Wis. 290; 62 N. W. 179; *Mooney vs. Miller*, 102 Mass. 217; *Dawe vs. Morris*, 149 Mass. 188; 21 Atl. 313; *Robertson vs. Parks*, 76 Md. 118; 24 Atl. 411; *New Brunswick Land Co. vs. Conybeare*, 9 H. L. 711.

¹⁶⁹ *French vs. Ryan*, 104 Mich. 625; 62 N. W. 1016. In this case the representation was as to the fu-

ture earnings of a corporation and made by a person having superior knowledge of the earning power of the corporation; such representation not being true was held to amount to actionable deceit. See also *Fidelity & Deposit Co. vs. Moshier*, 151 F. 806.

It is by application of this rule that a purchase of merchandise is held to be constructively fraudulent if the vendee has no reasonable expectation of being able to pay for the merchandise at maturity. *Talcott vs. Henderson*, 31 O. S. 162; *Powell vs. Bradlee*, 9 Gill. & Johns. (Md.) 220.

this safeguard, it was held not to be a defense that the creditor failed to do as stipulated.¹⁷⁰

Also the same rule was applied in a case where a retiring partner promised his guarantor against the firm debts, that he would not resume business. The guarantor who had been induced by this promise to enter into the undertaking was held liable, notwithstanding the retiring partner violated his agreement.¹⁷¹

§111. Conditional contracts of suretyship — Parol evidence not competent to show conditions.

A surety or guarantor will not be bound if the contract contains conditions which are not complied with. The common examples in which this rule is applied, are those cases in which notice of default, or demand upon the principal is stipulated,¹⁷² or the guaranty is one of collectibility, involving by necessary implication the condition of due diligence.¹⁷³

The promisor is entitled to stand upon the exact terms of his bargain, even though he may suffer no damage from the breach of it.

Such defense can not, however, be maintained unless the condition is expressed or necessarily implied from the writing as a part of the contract itself. This is the direct result of the Statute of Frauds, requiring the promise to be in writing, as well as the established rule of written contracts, that conditions cannot be imposed by parol.

But distinction must be made between conditions precedent and conditions subsequent; it is the latter which must be written

¹⁷⁰ *Benham vs. Assurance Co.*, 7 Welsb. H. & G. 744; *Towle vs. Nat. Guardian Assurance Society*, 3 Giff. 42.

¹⁷¹ *Gage vs. Lewis*, 68 Ill. 604, *Schoefield, J.*: "It can not be said that these representations and promises were false when made, for until the proper time arrived, and plaintiff refused to comply with them, it could not positively be known that they would not be performed. Even

if, at the time they were made, it was not intended to comply with them, it was but an unexecuted intention, which has never been held, of itself, to constitute fraud. If they legally amount to anything, they constitute a contract."

See also *Municipal Council vs. Peters*, 9 Up. Can. (C. P.) 205.

¹⁷² Ante Sec. 68.

¹⁷³ Ante Sec. 62.

in the contract. If the condition is that the contract is not to be delivered or take effect except upon the happening of a certain event, such as, for example, that it is not to be delivered or not to take effect unless another signs as co-surety; such condition may be shown by parol, and knowledge of this condition on the part of the creditor being established, the surety will not be held unless the co-surety signs.¹⁷⁴

If the condition relates to the performance of the contract, and operates to prevent the enforcement after the rights of the parties have vested, as distinguished from conditions which prevent either party from becoming bound in the first instance, the Statute of Frauds, as well as the ordinary rules of evidence relating to written instruments, will exclude parol proof in establishing such conditions.

A surety or guarantor cannot show by parol that the liability assumed was not to be enforced unless a certain contingency should arise.¹⁷⁵

¹⁷⁴ *Fertig vs. Bucher*, 3 Pa. 308; *Campbell Print. Press Co. vs. Powell*, 78 Tex. 53; 14 S. W. 245; *Smith vs. Kirkland*, 81 Ala. 345; 1 South. 276; *Cowan vs. Baird*, 77 N. C. 201; *Read vs. McLemore*, 34 Miss. 110; *Goff vs. Bankston*, 35 Miss. 518; *State Bank vs. Burton-Gardner Co.*, 14 Utah 420; 48 Pac. 402; *Bivins vs. Helsley*, 4 Met. (Ky.) 78; *Corporation of Huron vs. Armstrong*, 27 Up. Can. (Q. B.) 533; *Evans vs. Bremridge*, 8 DeG. M. & G. 100.

The theory of this class of cases is that such delivery to the principal by the surety, or by the principal to the creditor, coupled with a condition, creates an escrow, and no liability attaches till the terms of the escrow are met. It seems, however, that some cases hold that an escrow can not be created by a delivery to the obligee, and that conditions made with the obligee can not be shown by parol. *Moss vs.*

Riddle, 5 Cranch 351; *Murphy vs. Hubble*, 2 Duv. (Ky.) 247.

It is held that if the delivery is made to the obligee by a stranger, the obligee is bound to inquire whether any conditions were attached to the delivery, and failing to do so, will be bound by the condition, although having no actual knowledge of it. *State vs. Peck*, 53 Me. 284; *Smith vs. Moberly*, 10 B. Mon. (Ky.) 266; *Deardorff vs. Foresman*, 24 Ind. 481; *Nash vs. Fugate*, 24 Gratt. 202; *Passumpsic Bank vs. Goss*, 31 Vt. 315.

Also, if the bond is delivered to the obligee in an incomplete form, such as containing in the body of the bond, names the co-sureties who do not appear as signers, the obligee is chargeable with constructive notice of the condition that co-sureties were to sign. Ante Sec. 109.

¹⁷⁵ *Miller vs. Ridgely*, 22 Fed.

Conditions imposed by law need not be set out in the contract; thus where the law provides that no action shall be brought upon the bond of a public officer, unless an order of court has been entered directing the officer to pay; such condition may be pleaded as a bar, without being stipulated in the contract.¹⁷⁶

If the law supplies the condition that more than one surety shall sign, a sole surety should not be held. He should be permitted, without risk to himself, to rely upon public officers performing their full duty, in not accepting bonds except in conformity to law.¹⁷⁷

It has sometimes been considered that the requirement of statute for more than one surety is a provision wholly for the benefit of the public, and that the beneficiary, acting through the proper public officer, may waive such benefit without invalidating the bond.¹⁷⁸

This view, however, overlooks a valuable right of the surety, who might not have signed except with the expectation that the risk would be divided with another, and furthermore, public ministerial officers are not given, in this country, the power of suspending the operation of statutes.

There is, however, undoubted authority for the rule, that a surety may waive the requirement of statute for more than one surety and bind himself in an undertaking required by statute without complying with its terms. But such exception rests wholly upon the Surety's consent.¹⁷⁹

Rep. 889. Where the surety signed with the understanding that he should not be called upon for payment, except in the event of the death of the principal. See also *Bank vs. Richmond*, 235 Mo. 532; 139 S. W. 352.

¹⁷⁶ *State vs. Dent*, 121 Mo. 162; 25 S. W. 924.

¹⁷⁷ *Sharp vs. U. S.*, 4 Watts (Pa.) 21.

See also *Cook vs. Freudenthal*, 80 N. Y. 205, where the Statute as to the form of the bond was not complied with.

¹⁷⁸ *State vs. Benton*, 48 N. H. 551.

¹⁷⁹ *Toles vs. Adey*, 84 N. Y. 223. The bond in this case was given for \$2,000, and with one surety. The Statute required a bond for \$1,000 and two sureties. The surety signed with knowledge that the requirements of the Statute were not to be complied with, and consented that the bond should be delivered without complying with the Statute.

Held, Andrews, J.: "The evidence shows that the sheriff declined at first to take the undertaking in question, doubting his authority to do

§112. Same subject — Parol evidence competent in certain cases.

Where the defense of the surety or guarantor is the failure of consideration, the circumstances which disclose the consideration and the fact of its non-performance, may be shown by parol, although in many cases the agreement might be classed, without close discrimination, as a mere conditional contract.

In England, and for the most part in this country, the Statute of Frauds is either modified by amendment or judicial construction, so that the consideration of a suretyship contract need not now be expressed in writing¹⁸⁰ and the ordinary rules of construction, as applied to written instruments, do not make the consideration a *condition* of a contract, but rather one of the constituent *elements*, and if omitted from the writing it may be supplied by parol, for the purpose of disclosing the full agreement of the parties, but not to modify or impose conditions upon that agreement.

Language reciting the consideration is not contractual. A consideration is not necessarily a part of the promise of either party, but is the inducement of the promise.¹⁸¹

Thus a surety upon a note is induced to make a contract by the promise of the creditor to secure his release upon another note for which he is surety. Such promise by the creditor is not a condition and need not be expressed in writing; it is the consideration of the contract and may be shown by parol.¹⁸²

so. He did not take it in his official authority. He simply, as the transaction is proved, consented at the solicitation of A, to act as the intermediary to ascertain whether the plaintiff's attorney would accept the undertaking, and discharge him from arrest. When the plaintiff's attorney consented to the proposition and accepted the undertaking, it became operative and binding, not as a statutory obligation, but as a common law agreement between the parties, for the breach of which an action would lie as upon any other *assumpsit*."

¹⁸⁰ Ante Sec. 26, 27.

¹⁸¹ Where there is a promise expressed in the written contract to pay the consideration, or perform some duty constituting the consideration, the language reciting the consideration becomes contractual and cannot be modified by parol. *Stewart vs. Chicago Ry. Co.*, 141 Ind. 55; 40 N. E. 67.

¹⁸² *Campbell vs. Gates*, 17 Ind. 126.

See also *Port vs. Robbins*, 35 Ia. 208.

Where the inducement to the suretyship was that the creditor would dismiss a proceeding in bankruptcy against the principal, and such proceeding was not dismissed, it was held to be a failure of consideration.¹⁸³

A general promise of forbearance to sue the principal may be shown by parol to constitute the "condition" or terms under which the surety signed, and a failure to comply with these terms, will be ground of his discharge.¹⁸⁴

Parol proof will be received in most jurisdictions in this country, for the purpose of establishing the particular kind of suretyship contract made upon negotiable instruments.

An accommodation indorsement in blank, may be shown to be the contract of an indorser, as distinguished from a surety or guarantor, and the fact that this results in a liability conditioned upon demand and notice, is held not to be a variation of a writing by parol, although such evidence establishes conditions not appearing in the written contract, but merely the completion of a writing expressed in blank, by making definite and certain what was before indefinite and ambiguous; and for the same reasons, the creditor may show by parol, that the promisor signed as surety, and therefore not entitled to the privileges of notice.¹⁸⁵

Parol evidence will also be received to show that one of sev-

¹⁸³ Paton vs. Stewart, 78 Ill. 481.

¹⁸⁴ Wallace vs. Hudson, 37 Tex. 456.

¹⁸⁵ Rey vs. Simpson, 22 How. 341; Good vs. Martin, 95 U. S. 90; Greenough vs. Smead, 3 O. S. 416; Seymour vs. Mickey, 15 O. S. 515; Fullerton vs. Hill, 48 Kan. 558; 29 Pac. 583; Browning et al. vs. Merritt et al., 61 Ind. 425; Kealing vs. Vansickle, 74 Ind. 529; Cole vs. Smith, 29 La. Ann. 551.

In Connecticut a statute providing that a blank indorsement imports

the ordinary contract of the Indorser, has been held to restrict, in that State, parol evidence from being received to establish any other contract. Spencer vs. Allerton, 60 Conn. 410; 22 Atl. 778.

A similar Statute in Pennsylvania, leaves the promisor conclusively established as a second Indorser, while in New York the use of parol evidence is limited to proof, which shifts the contract from that of second Indorser to first Indorser.

Ante, Sec. 8.

eral obligors is a surety or guarantor, although he appears *prima facie* as maker.¹⁸⁶

§113. Release of promisor by the creditor.

While a promisor can not show by parol that the creditor agreed that the liability would be enforced only upon the happening of a certain contingency¹⁸⁷ or which is the same thing, that the surety or guarantor would be released if certain events took place, yet, it is competent to show by parol or otherwise, that subsequent to the making of the suretyship contract, the creditor, either by his words or by his conduct, exonerated the promisor, although the written contract is not surrendered or cancelled. Thus where the creditor tells the promisor that the debt is paid when it is not, or tells him that he will look to the principal alone and will not call upon the promisor in any event; this rests upon the ground that a party may at any time waive the benefits of a contract, and be bound by the waiver, and also upon the further reason that a creditor will be estopped from enforcing the suretyship contract, if he has once declared to the promisor that such contract is at an end, since the promisor, in reliance upon the declaration, might at once surrender securities held as indemnity or omit such further oversight of the debtor's affairs as would be necessary to his protection, if the suretyship was to subsist.

It may be doubted whether it is equitable that a promisor should be discharged in toto merely because he has been exposed

¹⁸⁶ Hubbard vs. Gurney, 64 N. Y. 457; Davies vs. Barrington, 30 N. H. 517; Mechanics Bank vs. Wright, 53 Mo. 153; American Invest. Co. vs. Marquam, 62 Fed. Rep. 960; Otis vs. Von Storch, 15 R. I. 41; 23 Atl. 39; First Nat'l Bank vs. Gaines, 87 Ky. 597; 9 S. W. 396; O'Howell vs. Kirk, 41 Mo. App. 523.

Contra — Shriver vs. Lovejoy, 32 Cal. 574; Stroop vs. McKenzie, 38 Tex. 132; Coots vs. Farnsworth, 61 Mich. 497; 28 N. W. 534.

The fact that the obligation is under seal does not appear to have affected the decision of the question as to whether parol proof will be received to shift the position of one who is apparently maker to that of promisor in suretyship. Rogers vs. School Trustees, 46 Ill. 428; Fowler vs. Alexander, 1 Heisk. (Tenn.) 425; Cole vs. Fox, 83 N. C. 463; Metzner vs. Baldwin, 11 Minn. 150.

¹⁸⁷ Ante Sec. 111.

to a risk, without a showing that he has been damaged, but such appears to be the holding of some courts of high authority.¹⁸⁸

Other cases, however, are based upon the fact that the promisor has changed his position, either by releasing securities held for his indemnity, or has been deprived of opportunities for protecting himself. Such views can be fully justified in principle.¹⁸⁹

A very learned judge has said: "We consider it well settled by numerous authorities, that when a creditor who knows that one debtor is a surety, gives him notice that the debt is paid by the principal, and such debtor, in consequence, changes his situation, as by surrendering security, or forbearing to obtain security when he might, or otherwise suffers loss by it, he is discharged. And although the debt has not been paid, and such notice was given by mistake, and without any fraudulent design, it is a mistake made at his own peril, and he shall rather bear the loss, than throw it upon one who has been misled by it."¹⁹⁰

A mere expression of opinion that the principal will pay and that the surety will probably not be called upon, will not release the surety.¹⁹¹

¹⁸⁸ *Harris vs. Brooks*, 21 Pick. 195. The basis of the holding in this case was a verbal statement by the creditor to the surety, that he would look to the principal for payment, and that the surety need not trouble himself about it. This was considered as an exoneration of the surety, without regard to any question of injury to him.

See also *Whitaker vs. Kirby*, 54 Ga. 277. It seems, however, that this case is based largely, if not altogether, on the language of the code, providing that a surety may be discharged by any act of the creditor which "exposes him to greater liability or increases his risk." *Wilkinson v. Conley*, 133 Ga. 518; 66 S. E. 372.

Contra—*Michigan State Ins. Co. vs. Soule*, 51 Mich. 312; 16 N. W. 662.

¹⁸⁹ *Bank vs. Haskell*, 51 N. H. 116; *Brooking vs. Bank*, 83 Ky. 431;

West vs. Brison, 99 Mo. 684; 13 S. W. 95; *Thornburgh vs. Madren*, 33 Ia. 380; *Auchampaugh vs. Schmidt*, 80 Ia. 186; 45 N. W. 567; *Baker vs. Briggs*, 8 Pick. 123; *National Bank of Commerce vs. Gilvin*, 152 S. W. 652; *Wilkins v. Hanson*, 119 Minn. 399; 138 N. W. 418.

The promisor is discharged only to the extent he was damaged. *McAlister vs. Pitts*, 58 Neb. 424; 78 N. W. 711.

¹⁹⁰ *Shaw, C. J.*, in *Carpenter vs. King*, 9 Met. 511.

¹⁹¹ *Howe Mach. Co. vs. Farrington*, 82 N. Y. 121; *Brubaker vs. Okeason*, 36 Pa. 519, *Strong, J.*: "It never yet has been held, that a declaration of the creditor that the principal debtor was good enough, that the surety was in no danger, and that the debt would be collected from the principal, without more was sufficient to estop the creditor from proceeding against the surety."

§114. Release of a co-promisor by the creditor.

The relation of co-sureties or co-guarantors to each other, imposes a limitation upon the contract of the creditor, founded upon the equities which each promisor has to require contribution from his co-obligors in suretyship.

One of the inherent equities growing out of the suretyship relation, is the application of the maxim "Equality is equity,"¹⁹² whereby several persons being bound for the same thing, may, without any express contract covering their rights in this respect, require that the burden of the undertaking be shared equally. Such is the basis of the doctrine of contribution in suretyship.¹⁹³

It is manifest that equality cannot be insured if the creditor is permitted at will to release one or more of the co-promisors from their share of the burden of the joint undertaking.

Different views have been held as to the extent to which relief should be granted to the remaining promisor, when his co-promisor has been discharged by the creditor.

The most generally accepted rule is that the remaining promisor will be discharged, in equity, and generally also at law, to the extent that he has been deprived of his right of contribution against his co-promisor, but that the act of the creditor cannot be turned to the further advantage of the remaining promisor by releasing him altogether; the result being merely, that he shall not be called upon to bear additional burdens on account of the discharge of others.¹⁹⁴

Such declarations are exceedingly common. They are often made to induce the surety to go into the contract, and they are repeated afterwards, without any design to mislead, or without being understood as a waiver of any rights. They are made and received as expressions of opinion. They never invite confidence, nor is confidence often reposed in them. Standing alone, they will not discharge the surety." *Michigan State Ins. Co. vs. Soule*, 51 Mich. 312; 16 N. W. 662. See also *Baldwin vs. Daly*, 41 Wash. 416; 83 Pac. 724.

¹⁹² Bracton Lib. 1 Cap. 3, Sec. 20.

¹⁹³ Post Chapter 10.

¹⁹⁴ *Morgan vs. Smith*, 70 N. Y. 537; *Lewis vs. Armstrong*, 80 Ga. 402; 7 S. E. 114; *Thomason vs. Clark*, 31 Ill. App. 404; *Waggener vs. Dyer*, 11 Leigh (Va.) 384; *Jemison vs. Governor*, 47 Ala. 390; *Rice vs. Morton*, 19 Mo. 263; *Gordon vs. Moore*, 44 Ark. 349; *Smith vs. State*, 46 Md. 617; *Robinson, J.*: "It seems also to be well settled that the release of one or more sureties without the assent of the co-sureties will operate *at law* to discharge the latter, because it is a cardinal principle

This rule will be applied whether the discharge of the co-promisor is by the voluntary act of the creditor, or is the result of the operation of law; as for example, where the co-surety requested a creditor to bring an action against the principal, and was discharged by failure of the creditor to institute the action as requested. The remaining surety was held to be discharged as to the contributory share of the co-surety thus released.¹⁹⁵

Such discharge of one of several co-promisors by operation of law, will not release the remaining promisor, unless resulting from the fault or procurement of the creditor. A discharge of

of suretyship that the surety has the right to stand by the very terms of the contract, and the creditor will not be permitted to change or alter the contract without concurrence of all the parties to it.

"In equity, however, the rule is different, and the release of one or more sureties will not be construed to have this effect, unless it subjects the co-sureties to an increased risk or liability. . . .

"It is difficult to imagine on what principle it can be maintained in equity, that the mere release of one surety discharges the other sureties from liability.

"As between themselves, the sureties are liable only for their proportion of the debt, and the right of contribution does not exist unless they have paid an amount exceeding this proportion.

"If, then, the release of one surety discharges the others from the payment of the proportion of the debt, which such surety ought to have contributed, and discharges them also from the proportion which he ought to bear in the loss arising from the insolvency of any of the other sureties, it is clear that such release can in no manner prejudice or subject the co-sureties to an increased risk." *Ex parte Gifford*, 6 Ves. 805; *Hodgson vs. Hodgson*, 2 Keen 704.

In *Cass County vs. American Ex-*

change Bank, 11 N. D. 238; 91 N. W. 59, a surety was wholly discharged where the name of one of five sureties who had signed a bond was erased after the defendant surety had signed. See also *Hilliboe vs. Warner*, 118 N. W. 1047; 17 N. D. 594.

The rule stated in the text rests upon the assumption that the release of one co-surety, deprives the remaining promisor of the right of contribution against him. But at least one Court of high repute is reported as holding that the remaining promisor may have contribution from the one who has been released by the creditor. *Clapp vs. Rice*, 15 Gray 557, *Hoar, J.*: "It is very clear that co-sureties are liable to contribution among themselves; and that the discharge of one of them from his principal obligation, if the others are not discharged, will not release him from the liability to contribute for their indemnity." *Lane vs. Moon*, 103 S. W. 211.

¹⁹⁵ *Klingensmith vs. Klingensmith*, 31 Pa. 460; *Trustees vs. Southard*, 31 Ill. App. 350; *Gordon vs. Moore*, 44 Ark. 349, 358. See also *Halloek vs. Yankey*, 102 Wis. 411; 78 N. W. 156.

But see *Wright vs. Stockton*, 5 Leigh (Va.) 153; *Towns vs. Riddle*, 2 Ala. 694. Holding that the failure to bring suit when requested by one surety, discharges both sureties.

a co-surety in bankruptcy, leaves the remaining surety liable for the full amount.¹⁹⁶

Again, the release by the creditor of a levy made upon the property of one of several sureties, is held to discharge the co-sureties to the extent of the contributory share of the surety whose property was released.¹⁹⁷

The extension of time to one of several sureties, would seem to involve precisely the same question of a discharge of the co-surety, to the extent of the contributory share of the surety whose obligation is extended, as it deprives the remaining surety of the privilege of having immediate contribution at maturity, if he pays the debt.¹⁹⁸

The release of one of several co-promisors, reserving all rights against the remaining promisors, is not within the operation of the rule, since the right of contribution is still preserved, inasmuch as the reservation in the contract of release

¹⁹⁶ *Sacramento Co. vs. Bird*, 31 Cal. 66.

Sec. 16, of the National Bankruptcy Act, 1898, provides that the liability of one who is a co-debtor with the Bankrupt, shall not be altered by the discharge of the Bankrupt. Release of a co-surety by plea of coverture does not affect liability of other sureties. *Warren vs. Louisville Tobacco Exch.* 55 S. W. 912.

¹⁹⁷ *Dodd vs. Winn*, 27 Mo. 501. The co-surety was discharged in this case to the extent of the pro-rata share of the surety whose property was released, and apparently without regard to the fact that the release of the levy restored the judgment, so that the co-surety paying the debt, might have enforced contribution, inasmuch as an abandonment of a levy restores the judgment, which has been conditionally satisfied by the levy, leaving in force the liability as if no levy had been made. *Green vs. Burke*, 23 Wend. 490; *Bole vs. Bogardis*, 86 Pa. 37;

McKeeby vs. Webster, 170 Pa. 624; 32 Atl. 1096.

The rule that a release of a levy upon property of the principal discharges the surety, furnishes a remote analogy for the application of the same rule where the levy is upon the property of a co-surety, but the principles involved are not parallel.

See also *Lower vs. Buchanan Bank*, 78 Mo. 67; *English vs. Seibert*, 49 Mo. App. 563.

Contra—*Starry vs. Johnson*, 32 Ind. 438; *Chipman vs. Todd*, 60 Me. 282; *Alexander vs. Byrd*, 85 Va. 690; 8 S. E. 577.

But see *People vs. Chisholm*, 8 Cal. 29, holding that the release of a levy upon property of a surety, discharges the co-surety to the extent of the value of the property released from levy.

¹⁹⁸ *Ide vs. Churchill*, 14 O. S. 372; *Gosserand vs. Lacour*, 8 La. Ann. 75.

Contra—*Draper vs. Weld*, 13 Gray 580; *Sherman County vs. Nichols*, 65 Neb. 250; 91 N. W. 198.

is considered as notice to the party released that his liability in contribution is to continue, and his acceptance of this arrangement, implies his assent to remain bound in contribution.¹⁹⁹

Some courts have maintained the view that the release of one co-surety, discharges the other altogether, on the ground that a surety has the right to stand upon the precise terms of his contract, and that the discharge of one places him in new relations, and is a variation of his contract.²⁰⁰

Statutory provisions in some States have been enacted which enable the creditor to release one of several co-promisors, without discharging the remaining promisors, except as to the contributory share of the one released.²⁰¹

§115. Defense of the promisor based upon the failure of the creditor to sue the principal when requested.

*Pro
me.*

There is no justification in principle in favor of a defense to a promisor, at common law, based upon the failure of the creditor to sue the debtor upon a liquidated claim, when requested by a surety or guarantor.

The creditor is not held responsible for any delay or negligence in pursuing his remedies against the principal except where a duty of diligence in this respect is imposed upon him

¹⁹⁹ Hood vs. Hayward, 124 N. Y. 1; 26 N. E. 331; Glasscock vs. Hamilton, 62 Tex. 143; Thompson vs. Lack, 3 C. B. R. 540; Kearsley vs. Cole, 16 M. & W. 128; Price vs. Barker, 4 El. & Bl. 760; McDonald vs. Whitfield, 27 Can. (S. C.) 94.

²⁰⁰ People vs. Buster, 11 Cal. 215; Spencer vs. Houghton, 68 Cal. 82; 8 Pac. 679; Stockton vs. Stockton, 40 Ind. 225; Seligman vs. Gray, 66 Mich. 341; 33 N. W. 510; Clark vs. Mallory, 185 Ill. 227; 56 N. E. 1099; Price vs. Barker, 4 El. & Bl. 670;

Collins vs. Prosser, 1 Barn. & Cr. 682.

See also Smith vs. State, 46 Md. 617. Where the complete discharge of the remaining surety is conceded to be the rule at law but not in equity, and the release in equity is held to be *pro tanto*.

To the same effect. State vs. Matson, 44 Mo. 305; Massey vs. Brown, 4 S. C. 85.

²⁰¹ Alford vs. Baxter, 36 Vt. 158; State vs. Atherton, 40 Mo. 209; Walsh vs. Miller, 51 O. S. 462; 38 N. E. 381; Hallock vs. Yankey, 102 Wis. 41; 78 N. W. 156.

by his contract or by statute,²⁰² and no additional equity in favor of the promisor arises from the fact that a request is made of the creditor to do that which it is conceded he was not bound to do of his own accord.

By the exercise of diligence, the promisor can have full protection by paying the debt himself at maturity, and bringing his own action against the debtor, or by bringing a proceeding in equity against the principal to compel him to pay the creditor,²⁰³ and he should not be permitted by a mere "request" to shift upon the creditor the burden of a greater degree of diligence than he himself is willing to exercise in his own behalf. Such is the holding of the great preponderance of authority in this country.²⁰⁴

²⁰² Ante Sec. 95.

²⁰³ *Moore vs. Topliff*, 107 Ill. 241; *Philadelphia & Reading Ry. vs. Little*, 41 N. J. Eq. 519; 7 Atl. 356; *Miller vs. Stout*, 5 Del. Ch. 259; *West vs. Chasten*, 12 Fla. 315; *Bishop vs. Day*, 13 Vt. 81; *Woolridge vs. Norris*, L. R., 6 Eq. Cases 410, *Giffard, V. C.* (quoting Lord Redesdale): "A Court of Equity will also prevent injury in some cases by interposing before any actual injury has been suffered; by a bill which has been sometimes called a bill *quai timet*, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress, or impleading. Thus, a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not."

See also *Washington vs. Tait*, 3 Humph. (Tenn.) 543; *Richards vs. Osceola Bank*, 79 Ia. 707; 45 N. W. 294; *Womack vs. Paxton*, 84 Va. 9; 5 S. E. 550; *Ardesco Oil Co. vs. No. Amer. Oil Co.*, 66 Pa. 375.

Sharswood, J.: "It is well set-

tled that as soon as a surety's obligation to pay becomes absolute he is entitled in equity to require the principal debtor to exonerate him, and he may at once file a bill to compel an exoneration, although the creditor has not demanded payment from him."

²⁰⁴ *Bellows vs. Lovell*, 5 Pick. 307; *Dane vs. Cordnan*, 24 Cal. 157; *Bull vs. Allen*, 19 Conn. 101; *Ingels vs. Sutliff*, 36 Kan. 444; 13 Pac. 828; *Eaton vs. Waite*, 66 Me. 221; *Gray vs. Farmers Bank*, 81 Md. 631; 32 Atl. 518; *Inkster vs. First Bank*, 30 Mich. 143; *Smith vs. Freyler*, 4 Mont. 489; 1 Pac. 214; *Quillen vs. Quigley*, 14 Nev. 215; *Harris vs. Newell*, 42 Wis. 687; *Wilds vs. Attix*, 4 Del. Ch. 253; *Louisiana Bank vs. Ledoux*, 3 La. Ann. 674; *Thompson vs. Bowne*, 39 N. J. Law 2; *First Bank vs. Homesly*, 99 N. C. 531; 6 S. E. 797; *Snow vs. Horgan*, 18 R. I. 289; 27 Atl. 338; *Benedict vs. Olson*, 37 Minn. 431; 35 N. W. 10; *Morrison vs. Citizens Nat'l Bank*, 65 N. H. 253; 20 Atl. 300. *Carpenter, J.*: "As between creditor and surety, it is the surety's business to see that the principal

Statutes in a number of States provide for the giving of notice by the promisor to the creditor to sue the principal, and for the discharge of the promisor if the notice is not complied with.

The general trend of these statutes is the same, and they usually provide for a notice in writing, and where such statutory rule is in force, the creditor cannot omit to bring his action without losing his right against the promisor, even though the surety or guarantor suffers no loss on account of the failure of the creditor to comply with the notice.²⁰⁵

pays. The creditor's chief purpose in requiring a surety is to avoid the necessity of resorting to legal remedies against the principal, to escape the vexation and expense of litigation, and cast the burden upon another. The surety's contract is, that he will himself pay the note when it falls due, and not that he will pay it in case the payee or holder cannot by due diligence enforce payment by the principal. If he performs his contract, the creditor has neither cause nor opportunity to institute legal proceedings."

See *Contra* Cases cited in Post Sec. 116.

²⁰⁵ The Statute in Ohio is as follows:

Sec. 5833.—"A person bound as surety in a written instrument for the payment of money, or other valuable thing, may, if a right of action accrue thereon, require his creditor, by notice in writing, to commence an action on such instrument forthwith, against the principal debtor; and unless the creditor commence such action within a reasonable time thereafter, and proceed with due diligence, in the ordinary course of law, to recover judgment against the principal debtor for the money or other valuable thing due thereby, and to make, by execution, the amount thereof, the creditor, or the assignee of such instrument, so failing to comply with the requisition of such surety, shall thereby forfeit the right which he would otherwise have to demand and receive of such surety the amount due thereon."

It is held that no particular form

of words is required under this Statute, and that a notice which substantially complies with the provisions of the Act is sufficient. *Clark vs. Osborn*, 41 O. S. 28; *Iliff vs. Weymouth*, 40 O. S. 101; *Alabama National Bank vs. Hunt*, 125 Ala. 512; 28 So. 488. But where the creditor is a married woman, a notice by a surety direct to and served upon her husband, demanding that he bring suit forthwith, is insufficient, although such notice be communicated and exhibited by the husband to his wife. *Moorman vs. Voss*, 83 N. E. 76; 77 Ohio 270.

See also for construction of similar Statutes in other States. *Pickens vs. Yarborough*, 26 Ala. 417; *Darby vs. Berney Nat. Bank*, 97 Ala. 643; 11 South. 881; *Thompson vs. Robinson*, 34 Ark. 44; *Bailey vs. New*, 29 Ga. 214; *Fish vs. Glover*, 154 Ill. 86; *Chrisman vs. Tuttle*, 59 Ind. 155; *Barnes vs. Mowry*, 129 Ind. 568; 28 N. E. 535; *Shenandoah Bank vs. Ayres*, 87 Ia. 526; 54 N. W. 367; *Keirn vs. Andrews*, 59 Miss. 39; *Petty vs. Douglass*, 76 Mo. 70; *First Bank vs. Homesley*, 99 N. C. 531; 6 S. E. 797; *Thompson vs. Watson*, 10 Yerg. (Tenn.) 362; *Harrison vs. Price*, 25 Gratt. 553; *Kittridge vs. Stegmier*, 11 Wash. 3; 39 Pac. 242; *Gillilan vs. Ludington*, 6 W. Va. 128; *Williams vs. Ogg & Keith Lumber Co.*, 42 Tex. Civ. App. 558; 94 S. W. 420; *Edmonson vs. Pott's Admr.*, 68 S. E. 254; 111 Va. 79; *Benge's Admr. vs. Eversole*, 156 Ky. 131; 160 S. W. 911.

It is held that the provisions of the Statute apply, although the

There are many holdings to the effect that the promisor in suretyship may maintain a bill in equity to compel the creditor to proceed against the principal,²⁰⁶ requiring before such remedy can be enforced, that the promisor first indemnify the creditor against the expense of the proceedings.

There is a marked difference, however, in the attitude of a promisor who seeks by this means to accelerate the diligence of the creditor, and the case where he merely relies upon a request made of the creditor, since in the latter he puts upon the creditor, the burden of all the risk, provided his action is fruitless, and sets himself up as the Chancellor to determine the necessity for the application of such a remedy. It must be conceded, however, that the position taken in some cases, granting jurisdiction in equity to a promisor to accelerate the diligence of the creditor, is not altogether consistent with the denial, by the same court, of a defense in equity, where the promisor suffers loss by the indifference of the creditor in not pursuing the debtor when requested.

§116. Same subject — The doctrine of *Pain vs. Packard*.

It has been held in the minority of the States that a moral and equitable duty rests upon the creditor to obtain payment if possible from the debtor, and not from one who is a mere surety,

creditor does not reside in the same jurisdiction as the principal. *Meriden Silver Plate Co. vs. Flory*, 44 O. S. 430; 7 N. E. 753. In this case the creditor was domiciled in Connecticut and the surety and principal in Ohio. But if the principal has left the state the obligee is not obliged to follow him and sue him in another jurisdiction. *Thompson vs. Treller*, 101 S. W. 174; 82 Ark. 247.

In *Richards vs. Bank*, 81 O. S. 348; 90 N. E. 1000, it was held that this provision of the statute is not applicable to those parties who are primarily liable under the negotiable instruments act.

Contra—*Cont. & C. Nat. Bank vs. Cobb*, 200 Fed. 511.

²⁰⁶ In *re Babcock*, 3 Story 390, *Story, J.*: "There is no doubt, that a surety for a debt may in many cases be entitled to relief by requir-

ing the creditor to proceed against the principal. . . . This is the common course, where the surety seeks, by a bill against the creditor and the principal, to compel the latter to exonerate the surety from losses which may otherwise be sustained by him by the delays and forbearance of the creditor in enforcing his debt." *Thompson vs. Taylor*, 72 N. Y. 32; *Whitridge vs. Durkee*, 2 Md. Ch. 442; *Irick vs. Black*, 17 N. J. Eq. 189; *Reusch vs. Keenan*, 42 La. Ann. 419; 7 South. 589.

Such remedy in equity is held to be merged in the Statute providing for a requirement on the part of the creditor to sue the principal upon notice. *Barnes vs. Sammons*, 128 Ind. 596; 27 N. E. 747.

and if the creditor omits to do this, when notified by the surety that a longer indulgence will expose him to hazard, and he actually suffers loss by the neglect of the creditor, he ought to be discharged.

The case of *Pain vs. Packard*²⁰⁷ decided in New York in 1816, is considered the parent case in the line of authorities maintaining this doctrine.

This case has never been overruled by the New York courts, though it has frequently been criticised by the later decisions,²⁰⁸ and has been modified by the restrictions placed upon its application to persons not in suretyship relations at the inception of the contract, but whose connection with the transaction is subsequent to the execution of the main contract, and who, though in the situation of a surety, such as an indorser in the chain of title, are not accommodation parties.²⁰⁹

Also the same modification is applied where the transaction is a sale of a chose in action, with a guaranty by the vendor;²¹⁰

²⁰⁷ 13 Johns. 174. The doctrine of *Pain vs. Packard* is adopted in the following cases: *King vs. Baldwin*, 17 Johns. 384; *Manchester Co. vs. Sweeting*, 10 Wend. 163; *Remsen vs. Beekman*, 25 N. Y. 552; *Black River Bank vs. Page*, 44 N. Y. 453; *Colgrove vs. Tallman*, 67 N. Y. 95; *Martin vs. Skehan*, 2 Col. 614; *Thompson vs. Robinson*, 34 Ark. 44; *Thompson vs. Watson*, 10 Yerg. (Tenn.) 362.

In the three cases last cited, the holding is that the Common Law Rule is in force, and that a verbal notice to the creditor is sufficient, notwithstanding the Statute providing for the written notice.

Dillon vs. Russell, 5 Neb. 484. In this case the condition is imposed that the promisor must accompany his request with an offer to indemnify the creditor against the expense of his action.

A request to be effective under the

doctrine of *Pain vs. Packard* must not be made before maturity. *Fidler vs. Hershey*, 90 Pa. 363.

It is held that the rule cannot be enlarged so as to require the creditor to proceed against the debtor in any particular way, such as to foreclose a lien or to issue attachment. *Haden vs. Brown*, 18 Ala. 641; *Rugles vs. Holden*, 3 Wend. 216; *First Bank vs. Wood*, 71 N. Y. 405.

²⁰⁸ *Warner vs. Beardsley*, 8 Wend. 198; *Herrick vs. Borst*, 4 Hill 650.

²⁰⁹ *Trimble vs. Thorne*, 16 Johns. 152.

²¹⁰ *Wells vs. Mann*, 45 N. Y. 327. "It is the right of a surety to pay the debt and prosecute the principal, and one who for value transfers a debt or security, and thereupon becomes guarantor or indorser, can protect himself against the consequence of delay in enforcing the principal obligation and cannot, we think, by notice impose upon the

thus leaving the rule in force only as to cases in which the promisor contracts solely for the benefit and accommodation of the principal debtor; from which it appears that the doctrine of *Pain vs. Packard* fills a smaller field, even in New York, than is sometimes claimed for it.

§117. The principal's right of set-off or counterclaim against the creditor as a defense to the promisor.

The legal right of set-off did not exist at common law, and the statutory authority upon which it rests is limited to cases where cross-demands exist between the parties; and if both demands are complete and mature and capable of liquidation, then in the furtherance of natural equity, legislative enactments permit one to be set off against the other when suit is brought, with a judgment for the balance against the one who owes the larger amount; but statutory set-off must be between the same parties and in their own right.

Again a counterclaim or recoupment of causes of action arising out of the same transaction upon which the plaintiff's claim is based, will be allowed to the defendant in reduction of his liability when sued, but just as in the case of set-off, this cross-demand must be in the defendant's own right.

The statutes creating these very useful and practical rules for doing justice, and the prevention of multiplicity of actions, generally do not in terms include persons standing in the suretyship relation, where the cross-demand is between the principal and creditor.²¹¹

But it is very clear, as a proposition of equity, that if the creditor is indebted to the principal, either upon a demand

creditor or holder the duty of active diligence at the risk of discharging the surety by omitting it." *Newcomb vs. Hale*, 90 N. Y. 326.

But see *Colgrove vs. Tallman*, 67 N. Y. 95, where one not originally bound as surety, but who was placed in the situation of a surety by subsequent events, was considered enti-

tled to the benefit of the rule of *Pain vs. Packard*.

²¹¹ *Sefton vs. Hargett*, 113 Ind. 592; 15 N. E. 513. The Statute in Indiana gives to the Surety sued alone the benefit of set-off in the right of the principal.

See also *Edmunds vs. Harper*, 31 Grat. (Va.) 637, construing similar Statute in Virginia.

arising out of the same transaction in which another is surety, or upon a separate cause of action, that the right of the principal to have counterclaim or set-off should inure to the promisor in suretyship when sued by the creditor.

The creditor should not be permitted to invoke a multiplicity of actions in adjusting his accounts with the principal, if by means of set-off or counterclaim, and without injustice to any of the parties involved, the same result could be reached with one action.

If the creditor is insolvent, an additional and stronger equity exists in favor of preventing him from enforcing his demand against the surety or guarantor, except upon the condition of first deducting his debt to the principal.

To permit a set-off or counterclaim in favor of the promisor in suretyship, in the right of the principal, involves, however, a practical difficulty, if the principal's claim against the creditor exceeds that of the promisor's liability.

The latter cannot have a judgment for the balance in his favor, neither could the right of action for the balance be preserved to the principal, without making divisible that which in its nature is entire, and exposing the creditor to a multiplicity of actions, if the claim of the principal against him should be divided.

In those cases, therefore, in which the creditor does not elect to make the principal and promisor both parties to his suit, and where the procedure does not permit the promisor when sued alone, to bring in the principal as a party, on motion, the doctrine of equitable set-off or equitable counterclaim in favor of the promisor, and in the right of the principal, cannot apply; at least not in those cases where the principal's claim against the creditor, exceeds that of the creditor against the promisor.²¹²

²¹² Gillespie vs. Torrance, 25 N. Y. 306. In this case there was a breach of warranty, giving rise to a claim for damages against the creditor, and in favor of the principal, upon a contract for which the de-

fendant was an accommodation indorser. The Court said: "The principal has a right of election whether the damages shall be claimed by way of recoupment in the suit on the note, or reserved for a cross-

For special equitable reasons, such as the insolvency of the creditor, it has been held that the cross-demands in favor of the principal may be adjudicated without having the principal before the court.²¹³

The right to make the principal and promisor both parties to his action, whether the liability is joint or several, or to sue them separately at his option, is accorded to the creditor by statute in most of the States; but these statutes do not generally furnish authority to the promisor to require the creditor to exercise this option.²¹⁴

At common law a joint action only could be brought to enforce a joint liability,²¹⁵ so that the equitable rights of the promisor to have set-off or counterclaim in the right of the principal, can always be worked out where the liability is joint, and the common law requirement of joint actions has not been modified by statute, since the principal in such cases is necessarily a party.

action. The defendant (Indorser) cannot make this election for him. If the defendant has a right to set up the counterclaim, and have it allowed, in the action, it must bar any future action by the principal for the breach of warranty; and as no balance could be found in defendant's favor, he might thus bar a large claim in canceling a small one. If the right exists in this case, it would equally exist if the note was but \$100 instead of \$1,800. Supposing the other notes given for the timber to have been indorsed by different persons, for the accommodation of the principal and all to remain unpaid, each of the indorsers would have the same right as the defendant. If they were to set up the same defense, how would the conflicting claims be reconciled?" *Lasher vs. Williamson*, 55 N. Y. 619; *Newton vs. Lee*, 139 N. Y. 332; *Elliott vs. Brady*, 192 N. Y. 221; 85 N. E. 69; 34 N. E. 905; *Osborne vs. Bryce*, 23 Fed. Rep. 171; *Beard vs. Union Co.*, 71 Ala. 60; *B. & O. R. R. Co. vs. Bitner*, 15 W. Va. 455; *Thalheimer vs. Crow*, 13 Col. 397; 22 Pac. 779.

Contra—*Scroggin vs. Holland*, 16 Mo. 419; *Aultman vs. Hefner*, 67 Tex. 54; 2 S. W. 861; *Dechervaise vs. Lewis*, L. R., 7 C. P. 372; *Murphy vs. Glass*, L. R., 2 P. C. 408; *Alcoy Ry. vs. Greenhill*, 41 London Solicitors Jour. 330.

²¹³ *Jarratt vs. Martin*, 70 N. C. 459; *Scholze vs. Steiner*, 100 Ala. 148; 14 South. 552.

Contra—*Willoughby vs. Ball*, 18 Okl. 535; 90 Pac. 1017.

Where the maker is insolvent and the surety is sued alone, the court may require the maker to be brought in as a party defendant for purpose of adjudicating a counterclaim between the creditor and the maker. *Hines vs. Newton*, 30 Wis. 640.

²¹⁴ *Wilkins vs. Bank*, 31 O. S. 565; *Walsh Const. Co. vs. City of Cleveland*, 250 Fed. 137. If Statutory authority does not exist, the principal and promisor can not be jointly sued by the creditor, except where the liability is joint. *Abbott vs. Brown*, 131 Ill. 108; 22 N. E. 813; *Graham vs. Ringo*, 67 Mo. 324; *Tyler vs. Trustees*, 14 Ore. 485; 13 Pac. 329; *Virden vs. Ellsworth*, 15 Ind. 144; *Cross vs. Ballard*, 46 Vt. 415.

²¹⁵ *Kautzman vs. Weirich*, 26 O. S. 332.

Where all the parties are before the court, the right of equitable set-off or counterclaim in favor of the promisor, upon cross-demands between principal and creditor, is fully established in this country.²¹⁶

§118. Defenses based upon the right of the promisor to control the application of collateral.

If the creditor holds collateral security belonging to the principal, and his contract with the principal is such that he is at liberty to apply the proceeds to any one of several debts owing by the principal, the surety or guarantor on one of these debts has no right to control the application so as to cause it to be applied in reduction of the particular debt for which he is liable.²¹⁷

Unless restricted by a contract to the contrary, the creditor

²¹⁶ *Mahurin vs. Pearson & Bellows*, 8 N. H. 539, *Parker, J.*: "There are several considerations which show the propriety of allowing the set-off in this case. If the debt from the plaintiff to Pearson, which was offered in set-off, was contracted after that now in suit, it very probably might have been regarded by the parties as in effect a payment thus far. It is at least but equitable that it should so operate, whether contracted before or after. The rule in equity is, that if a creditor have security, the surety, on payment by him, is entitled to be substituted, and to have the benefit of that security.

"If, instead of having security, the creditor owes the principal part of the amount, and the principal is willing to put in a set-off, it is equally reasonable that the surety should have the benefit of the credit which the creditor has obtained of the principal. And, moreover, it will tend to prevent multiplicity of actions; for, should the plaintiff collect his debt of Bellows, the latter must have an action against Pearson to recover the amount, and Pear-

son will have a right of action on the claim now offered in set-off." *Livingston vs. Marshall*, 82 Ga. 281; 11 S. E. 542; *Waterman vs. Clark*, 76 Ill. 428; *Himrod vs. Baugh*, 85 Ill. 435; *Ronehel vs. Lofquist*, 46 Ill. App. 442; *Reeves vs. Chambers*, 67 Ia. 81; 24 N. W. 602; *Spencer vs. Almoney*, 56 Md. 551; *Concord vs. Pillsbury*, 33 N. H. 310; *Andrews vs. Verrell*, 46 N. H. 17; *St. Paul vs. Leck*, 57 Minn. 87; 58 N. W. 826; *Wagner vs. Stocking*, 22 O. S. 297; *Hollister vs. Davis*, 54 Pa. 508; *Wartman vs. Yost*, 22 Grat. 595; *McHardy vs. Wadsworth*, 8 Mich. 349; *Pierce vs. Bent*, 69 Me. 381; *Pickett vs. Andrews*, 69 S. E. 478; 135 Ga. 299.

²¹⁷ *Fall River National Bank vs. Slade*, 153 Mass. 415; 26 N. E. 843; *Tolerton & Stetson Co. vs. Roberts*, 115 Iowa 474; 88 N. W. 896; *Advance Thresher Co. vs. Hogan*, 74 O. S. 307; 78 N. E. 436; *Livermore Falls Trust & Banking Co. vs. Richmond Mfg. Co.*, 79 A. 844; 108 Me. 206; *Kissire vs. Plunkett-Jarrell Grocer Co.*, 145 S. W. 507; 103 Ark. 473.

may apply the proceeds of collateral to the payment of such debts as are unsecured.²¹⁸

The promisor may avail himself of all the rights of the principal as to the application of collaterals, and if, at the time of the creation of the debt or the delivery of the collateral, the principal directs that they are to be held for the special debt for which another is surety or guarantor, the latter may be discharged to the amount of the value of such securities, if they are otherwise applied.²¹⁹

But such right to control the application of the security, cannot be exercised after the transaction has been completed, and the security delivered. The creditor, under these circumstances, may exercise his option to apply the proceeds of the collateral as his own interests may require.²²⁰

If a creditor has both a personal remedy against a promisor in suretyship, and also a fund or security in his hands to which he might resort, and the latter is a fund or security not available to the promisor by way of subrogation, a court of equity

²¹⁸ *Lester vs. Houston*, 101 N. C. 605; 8 S. E. 366; *North vs. La Flesh*, 73 Wis. 520; 41 N. W. 633; *Hanson vs. Manley*, 72 Ia. 48; 33 N. W. 357.

²¹⁹ *Mellendy vs. Austin*, 69 Ill. 15; *Hidden vs. Bishop*, 5 R. I. 29.

This case holds that the promisor has the same right to his discharge if the collateral is diverted, whether he had knowledge or not at the time he made his contract, of the terms under which the creditor holds the collateral. The Court said: "The equity which entitles a surety to the benefit of all securities of the principal deposited with the creditor to assure payment of the debt, is wholly independent of any contract between the surety and the creditor, and indeed of any knowledge on the part of the surety of the deposit of the securities. . . . In such

case, the creditor is regarded as a trustee of the security deposited with him, for the benefit of all parties known to him to be interested in it, and is bound to administer the trust created by the deposit, unless discharged by the surety, in *his* relief, as well as in accordance with his own interests and those of the principal. It follows, that any application of the security by the creditor to other purposes than those marked out by the terms of the deposit, or any decrease of its value by means of his negligence or mistake, discharges the surety from liability to him in that character, to the extent of the misapplication or decrease of value thus occasioned." *Baughner vs. Duphorn*, 9 Gill (Md.) 314; *Pearl vs. Deacon*, 24 Beav. 186.

²²⁰ *Field vs. Holland*, 6 Cranch 8; *Nat'l Bank vs. Bigler*, 83 N. Y. 64.

will require the creditor to first apply such collateral, before enforcing the personal remedy.²²¹

But such relief is based upon special equities, and is not extended where the creditor merely exercises his choice of two remedies for the collection of the debt, leaving the securities in his hands immediately available to the promisor by subrogation, in case the creditor chooses to enforce his rights against him.²²²

The natural equity involved in the proposition that a creditor owes a moral duty to save the accommodating party from loss where it can be done without injury to himself, has found expression in the statutes which provide that in the case of a joint or several judgment, against a principal and surety in the same action, execution shall first issue against the principal, and no execution shall be laid upon the property of the surety, till the property of the principal has been exhausted.

The statutes in this respect must be complied with by the issue of an execution against the principal, even though such execution is fruitless by reason of the insolvency of the principal.²²³

²²¹ *Hayes vs. Ward*, 4 Johns. Ch. 123. In this case, the creditor, as additional security, took from the principal a mortgage, which was void because of usury, and the surety brings this action to enjoin the creditor from action against him until he had first proceeded upon his mortgage. The injunction was allowed, upon the theory that the mortgage, because of the usury, would not be available to the surety, and that the creditor should not have the right to require payment of the surety, leaving the latter to proceed against the fund in the creditor's hands, made valueless by the creditor's own act.

The reasoning of this case is not convincing, for whether the mortgage in the hands of the creditor is valid or not, the surety is not the

loser; if the mortgage is valid, the title of the principal would be restored on payment of the debt by the surety, leaving to the surety the option to proceed against the property by direct action for indemnity, or by subrogation to foreclose in the right of the creditor. If the mortgage is invalid, his right to subject the property in his action for indemnity is not impaired, and the taint of usury in the transaction does not affect him.

²²² *Davis vs. Patrick*, 57 Fed. Rep. 909; *Bingham vs. Mears*, 4 No. Da. 437; 61 N. W. 808; *Thorn vs. Pinkham*, 84 Me. 101; 24 Atl. 718; *Allen vs. Woodard*, 125 Mass. 400; *Penn vs. Ingles*, 82 Va. 65; *Aultman vs. Smith*, 52 Mo. App. 351.

²²³ *Johnson vs. Harris*, 69 Ind. 305; *Crawford vs. Turnbaugh, Trustee*, 86 O. S. 43; 98 N. E. 858.

§119. Revocation — Death of the promisor.

If the contract is executory, such as a commercial guaranty of future optional advances, the obligation is not binding upon the promisor until acted upon by the creditor, and may be revoked by notice at any time before it becomes binding; or if the advances are divisible, each advance is a separate consideration, and the promisor may at any time, terminate the engagement as to future or additional advances. In such cases, the death of the guarantor, operates as constructive notice of a revocation from the time that knowledge of the death is brought home to the creditor.²²⁴

The contract of the surety is not in general revokable by notice, and such promisor cannot withdraw from his obligation, without the consent of the creditor, unless stipulated in his contract or provided by law, as in cases of bonds of public officers in some jurisdictions.

The same rule applies to an executed contract of guaranty.

The death of the surety or guarantor, where the contract is executed, and the consideration passed, does not revoke the obligation, and the estate of the promisor will be liable for default committed subsequent to the death.

Thus a bond was required of an applicant for election as a member of an Underwriting Association, and the bond being furnished, he was elected to such membership. The consideration was wholly executed, and consisted in the giving to the principal the status and privileges of such membership, and it was held that the death of the surety on the bond, although known to the Association, did not revoke the obligation, and that the estate was liable for defaults subsequent to the death.²²⁵

The same situation arises where a surety engages that an-

²²⁴ Ante Sec. 71.

See *Jordan vs. Dobbins*, 122 Mass. 168, where it is held that the death of the guarantor operates as a revocation, even though the creditor makes the subsequent advances without notice of the death; *Aitken, Son & Co. vs. Lang's Admr.*, 106 Ky. 652; 51 S. W. 154.

²²⁵ *Lloyd's vs. Harper*, 16 Ch. Div. 290.

See also *Kernochan vs. Murray*, 111 N. Y. 306; 18 N. E. 868.

Bondsmen in a bastardy proceeding are released by death of the principal. *People vs. Tice*, 272 Ill. 516; 112 N. E. 372.

other will perform the covenants of a lease,²²⁶ or in the case of a contract for employment for a definite time, either in a private capacity or as a public officer.²²⁷

A bond for costs will survive the death of a surety.²²⁸

Where the undertaking was to answer for the default of another, so long as he continued in the service as a collector, the suretyship was held to survive the death of the promisor, inasmuch as by the terms of the contract it was not terminable until the service was ended.²²⁹

At common law where a surety became jointly liable with the principal, the death of the surety ended the obligation and the estate was released both as to past and future defaults. This was merely an application of the rule which prevailed at common law as to all joint obligations. In the early cases it was held that the survivor must bear the whole burden of such contracts, even though the decedent participated in the consideration.²³⁰

Courts of Equity, however, invented a fiction whereby joint obligations, in which both parties were participants in the consideration, were taken out of the rule by holding that such joint

²²⁶ *Coe vs. Vogdes*, 71 Pa. 383.

²²⁷ *Shackamaxon Bank vs. Yard*, 143 Pa. 129; 22 Atl. 908; *Broome vs. United States*, 15 How. 143; *Mowbray vs. State*, 81 Ind. 324; *Snyder vs. State*, 5 Wyo. 318; 40 Pac. 441; *Hightower vs. Moore*, 46 Ala. 387; *Rapp vs. Phoenix Co.*, 113 Ill. 390; *Royal Co. vs. Davies*, 40 Ia. 469; *Holthausen vs. Kells*, 45 N. Y. S. 471; *Hecht vs. Weaver*, 34 Fed. 111.

²²⁸ *Fewlass vs. Keeshan*, 88 Fed. Rep. 573, *Taft, J.*: "The rule as to the obligation of a guarantor in respect to transactions occurring after his death is that the obligation is not affected by his death if the contract was one from which he might not withdraw upon notice, but that, if he could have done so, then his death will be given the effect of a

notice of withdrawal, at least from the time when the knowledge of the same has been brought home to the obligee. A Court cannot release a surety upon a cost bond without the consent of the party for whose benefit the security has been given. This feature of the obligation of a cost bond places it in the category of irrevocable guaranties, the obligations of which continue according to their terms, without regard to the death of the guarantor."

See also *McCosky vs. Barr*, 79 Fed. Rep. 408.

²²⁹ *Calvert vs. Gordon*, 3 Man. & Ry. 124.

²³⁰ *Towers vs. Moor*, 2 Venn. 98; *Lane vs. Doty*, 4 Barb. 530; *Demott vs. Field*, 7 Cow. 58; *Foster vs. Hooper*, 2 Mass. 572.

obligations must have been intended as joint and several, and written as joint contracts by mistake.²³¹

But Courts of Equity declined to extend the fiction to include parties not joining in the consideration, and the estate of a surety was held entitled to go acquit.²³²

²³¹ *Simpson vs. Vaughan*, 2 Atk. 31; *Bishop vs. Church*, 2 Vessey 100; *Weaver vs. Shyrook*, 6 Serg. & R. 262, *Tilghman, C. J.*: "It is a fair presumption, in the absence of all evidence to the contrary, that every man understands what he is doing, and that these obligors understood the long and well established difference between a joint and a joint and several obligation. But this presumption may be rebutted by circumstances; and one circumstance on which Courts of Equity have laid great stress, is, that the money for which the bond was given, was borrowed by, or came to the use of, both the obligors; in such case, the very act of borrowing, does, in itself, amount to a contract, antecedently to their entering into a bond, that each and both should be bound to pay.

"When, therefore, the bond is afterwards so drawn as to constitute only a joint obligation, there is a reasonable presumption, that either through fraud, ignorance or inadvertence the meaning of the parties has not been carried into effect."

If the suretyship contract was for the benefit of the surety, his estate will not be discharged from liability, such as the discharge of a prior obligation upon which the surety was liable. *Boyd vs. Bell*, 69 Tex. 735; 7 South. 657; *Richardson vs. Draper*, 87 N. Y. 337.

²³² *Jones vs. Beach*, 2 DeGex. M. & Y. 886; *Getty vs. Binsse*, 49 N. Y. 385; *Wood vs. Fisk*, 63 N. Y.

245; *Risley vs. Brown*, 67 N. Y. 160. Such rule will be applied, although the obligation is joint and several, if the creditor elects to recover a joint judgment, and thereby the right against the surety in severalty is merged in the judgment.

United States vs. Price, 9 How. 84, *Grier, J.*: "When an obligee takes a joint and several bond, he has nothing to ask of equity; his remedy is wholly at law. If he elects to take a joint judgment, he voluntarily repudiates the several contract, and is certainly in no better situation than if he had originally taken a joint security only; equity gives relief, not on the bond, for that is complete at law, but on the moral obligation, antecedent to the bond, when the creditor could have had no remedy at law.

"An obligee who has a joint and several bond, and elects to treat it as joint, may sometimes act unwisely in so doing, but his want of prudence is no sufficient plea for the interposition of a chancellor. Nor can the conscience of a mere security be affected, who, having tendered to the obligee his choice of holding him jointly or severally liable, has been released at law by the exercise of such election."

It is held that a judgment lien upon the property of a surety jointly liable with the principal, will survive the death of the surety. *Baskin vs. Huntington*, 130 N. Y. 313; 29 N. E. 310.

Nearly all the States in this country now express their disapproval of the reasoning which exonerates the estate of a surety, by the enactment of statutes holding the estate of the surety to the same liability as if the surety had survived.²³³

²³³ *Burgoyne vs. Ohio*, 5 O. S. 586, *Ranney, J.*: "This Statute effected an entire abrogation of the common law principle to which allusion has been made, and left the estate of the joint debtor liable to every legal remedy, as fully as though the contract had been joint and several."

See also *Mays vs. Cockrum*, 57 Tex. 352; *Donnerberg vs. Oppenheimer*, 15 Wash. 290; 46 Pac. 254; *Powell vs. Kettelle*, 6 Ill. 491. The Common Law rule as to the discharge of the estate of a deceased joint obligor, has never been in force in Indiana. *Hudelson vs. Armstrong*, 70 Ind. 99.

The appointment of a receiver for a surety company does not terminate existing contracts. *Evans vs. Illinois Surety Company*, 298 Ill. 101; 131 N. E. 262. "On the death of the surety or dissolution of a surety corporation there certainly can be no difference, in principle, between individual and corporation. If death does not relieve an individual surety from the obligation he has entered into, the dissolution or receivership of a corporation can not relieve a corporate surety."

The death of a surety on a replevin bond does not change the liability of his estate upon the

bond; it is the same as his liability would have been had he lived. *Union Trust Co. vs. Shoemaker*, 258 Ill. 564; 101 N. E. 1050.

A mere guarantee of advances, no present consideration being given, is but an offer for successive unilateral contracts which the death of the offeror *ipso facto* terminates. *Aiken vs. Lang's Admr.*, 106 Ky. 652; 51 S. W. 154; *Hyland vs. Habich*, 150 Mass. 112; 22 N. E. 765. But where a contract has been made, death does not terminate it. *Kernochen vs. Murray*, 111 N. Y. 306; 18 N. E. 868. Losing sight of this fundamental distinction seems to have led to confusion. Thus, mere guarantees have been called contracts terminable upon notice of death either by reading such a limitation into the contract or by holding the consideration divisible. *Valentine vs. Donahue-Kelly Baking Co.*, 133 Cal. 191; 65 Pac. 381. Where the guarantee is merely intended as an offer, the seal will not prevent its termination by the death of the guarantor. *Jordan vs. Dobbins*, 122 Mass. 168. But some courts will require notice to the creditor. *Gay vs. Ward*, 67 Conn. 147; 34 Atl. 1025; *Nat. Eagle Bank vs. Hunt*, 16 R. I. 148; 13 Atl. 115.

CHAPTER V.

BONDS TO SECURE PRIVATE OBLIGATIONS.

- Sec. 120. Private Obligations Distinguished from Official Duty in Public Office.
- Sec. 121. A Bond is a Specialty—Form and Execution.
- Sec. 122. The Signing and Sealing of a Bond.
- Sec. 123. Delivery and Acceptance are Necessary to the Validity of a Bond.
- Sec. 124. Incomplete Bonds—Right of the Obligeo to Fill Blanks.
- Sec. 125. The Incorporation of Other Instruments Into the Bond by Reference.
- Sec. 126. Consideration.
- Sec. 127. Bonds Obtained by Fraud or Misrepresentation.
- Sec. 128. Parol evidence in Aid of Construction.
- Sec. 129. Commencement and Duration of Liability Upon a Bond.
- Sec. 130. Bonds of General Indemnity.
- Sec. 131. Bonds to Secure Building Contracts, with Covenants for the Payment of Labor and Material Claims.
- Sec. 132. Alteration of the Principal Contract as a Defense to Sureties Upon the Bond.
- Sec. 133. Alterations in Bond as a Defense to the Sureties.
- Sec. 134. Surety Upon Bond Estopped from Denying the Recitals of the Bond.
- Sec. 135. Measure of Damages Upon Breach of the Conditions of a Bond.
- Sec. 136. Same Subject—Where the Penalty or Forfeiture is Imposed by Statute.
- Sec. 137. Interest as an Element in the Measure of Damages.
- Sec. 138. Bonds to Induce Violation of Law are Void.
- Sec. 139. Bonds to Prevent Performance of Public Duty or to Induce Acts In Violation of Public Duty are Void.
- Sec. 140. Discharge of Surety Upon a Bond by Payment or Acts Equivalent to Payment
- Sec. 141. Statutes of Limitations as a Defense to Sureties Upon a Bond.
- Sec. 142. As to Who are Proper Parties in an Action Upon a Bond.
- Sec. 143. Joinder of Parties Plaintiff.
- Sec. 144. Joinder of Parties Defendant.

§120. Private obligations distinguished from official duty in public office.

Private obligations are contractual, and the duties imposed arise from the agreement of the parties.

Official duty in Public Office is imposed by law, the terms of which are either expressed directly in a statute defining the duty, or implied from the statute creating the office.

Private obligations are subject to the will of the parties, they are conventional, and in varying form as the parties may finally stipulate between themselves, and may thereafter be waived in whole or in part.

Official duty is fixed, and subject to no modification or waiver by convention between the obligor and obligee. It depends on the law for its expression, and no representative of the Sovereign power, whether executive or judicial, is clothed with authority to suspend or vary the terms of Official duty.

Bonds to secure the performance of private contracts, and bonds of Public Officers, by reason of these inherent differences in the character of the obligation to be secured, are subject to rules of construction which differ in many important respects.

In this chapter will be discussed bonds given to secure the performance of voluntary contracts, whose terms are wholly defined by the parties themselves, without any dictation from the law, although, in some instances, the law dictates the kind of bond that must be made as a security, such as bonds to secure the performance of contracts made with the State or Municipality in furnishing supplies or erecting public works.

General and special indemnity bonds, including agents and employees in positions of trust; bonds to secure the performance of building contracts, or to secure against loss from failure of title, or to indemnify against the consequences of legal action, bonds against loss by reason of the insolvency or other breach in the contract of another, constitute the special field of this chapter.

§121. A bond is a specialty — Form and execution.

A bond is an instrument of great formality, made usually with care and deliberation, and except in those States where private seals are abolished by Statute, is required by law to be under seal, and is a specialty.

In its formal parts it purports to bind the obligors and their heirs and representatives, with recitals as to the terms of the principal contract, and the duty or indemnity to be secured, with a defeasance or conditional covenant, setting out the limitations upon the liability of the sureties.

It is not necessary that the bond recite with nice precision the several constituent terms of the undertaking.

Apt words may always be found to express exactly the particular contract which in law is deduced from a bond, but the obligation will not fail because the parties employed less appropriate words to express their meaning.¹

It is essential, however, that the instrument recite that there is a debt or obligation to be secured, with a promise to pay the debt or perform the obligation,² and there must appear in some form the condition upon which the obligation is to become void. Otherwise the instrument is not a bond, and will not impose any liability upon the surety.³

Also a bond will be a nullity unless the obligee is named therein. There must be a certainty as to the person to whom the obligation runs.⁴ Even proof of a delivery to a particular person, is not sufficient to supply the deficiency.⁵

¹ *Inhabitants of Trescott vs. Moan*, 50 Me. 347.

² *Wood vs. Chetwood*, 44 N. J. Eq. 64.

³ *Fitzgerald vs. Staples*, 88 Ill. 234.

⁴ *Garrett vs. Shove*, 15 R. I. 538; 9 Atl. 901; *Sacra vs. Hudson*, 59 Tex. 207; *Preston vs. Hull*, 23 Gratt. 600; *Pelham vs. Grigg*, 4 Ark. 141; *People vs. Pacific Surety Co.*, 50 Colo. 273; 109 Pac. 961; *Ann. Cases* 1912C, 517.

⁵ *Phelps vs. Call*, 7 Ired. (N. C.) 262.

If the obligee is described with sufficient certainty to identify him, although not named, it will be sufficient. Thus where the obligation was to pay a certain note which was described in the bond, and the name of the payee of the note given, it was considered that the obligee was described with sufficient certainty. *Leach vs. Flemming*, 85 N. C. 447.

These questions are here made without reference to the right of the holder to fill in blanks and supply the omissions as to names, dates and other formal requirements.⁶

But where this has not been done, under the rules for the completion of unfinished instruments by the application of the principles of agency, the courts will generally refuse to permit a reformation, such as for instance, the admission of parol proof to supply the amount of the penalty, where it has been left blank.⁷

It is not necessary that the name of the obligors appear in the body of the instrument. These names being signed to the paper will sufficiently establish a promise, although blanks are left for the name of the obligor in the covenant which recites the promise.⁸

§122. The signing and sealing of a bond.

A bond which purports to be the obligation of both the principal and surety, must be executed by both. If the principal does not sign, the surety is not bound.⁹

But where the principal in a bond would be liable without reference to the bond for the acts constituting the breach, and by the terms of such bond the parties bind themselves severally as well as jointly to perform its conditions, the failure of the principal to sign the bond will not release the surety from liability.^{9a}

Many forms of bonds do not require the signature of the principal. The latter is already liable to the obligee upon the contract which the bond secures, and no additional liability is created by including him as a party to the bond, although it serves a useful purpose in the matter of the remedy for en-

⁶ Post Sec. 124.

⁷ Church vs. Noble, 24 Ill. 291; Copeland vs. Cunningham, 63 Ala. 394; Evarts vs. Steger, 6 Ore. 55.

⁸ Partridge vs. Jones, 38 O. S. 375; Building Association vs. Cummings, 45 O. S. 664; 16 N. E. 841; Howell vs. Parsons, 89 N. C. 230; Danker vs. Atwood, 119 Mass. 146; Moore vs. McKinley, 60 Ia. 367; 14 N. W. 768.

⁹ Goodyear Dental Vulcanite Co. vs. Bacon, 151 Mass. 460; 24 N. E. 404; School District vs. Lapping, 100 Minn. 139; 110 N. W. 849;

Bjoin vs. Anglim, 97 Minn. 526; 107 N. W. 558; Selby vs. City of New Orleans, 119 La. 900; 44 So. 722; Bryant vs. Kinyon, 127 Mich. 152; 86 N. W. 531; North St. Louis B. & L. Assoc. vs. Obert, 169 Mo. 507; 69 S. W. 1044; Novak vs. Pitlick, 120 Ia. 286; 94 N. W. 916; La Belle Iron Works vs. Quarter Savings Bank (W. Va.), 82 S. E. 614.

^{9a} U. S. F. & G. Co. vs. Haggart, 163 Fed. 801; 91 C. C. A. 289; City of Deering vs. Moore, 86 Me. 181; 29 Atl. 998; Deer Lodge County vs.

forcing the liability, if both are parties to the bond, since the instrument may be declared upon in a single action against both.

It is not necessary that the signature be actually affixed by the party himself, if he afterward acknowledges the bond and ratifies the signing made by another without his authority he will be bound.¹⁰

It has been held that the bond need not be signed at all to be binding, if the instrument is sealed.¹¹

The courts have liberally construed the requirements of the Statute of Frauds in reference to the signing of contracts within the provisions of the statute, and the signature may be by the initials, or the mark of the party, or even be printed, if there is evidence of its adoption by the party to be charged, and may be placed on any part of the instrument, if so placed as to authenticate the paper as the act of the party.¹²

Where the signature is followed by words descriptive of the official position of the signer, such as "Cashier," it will be binding as the personal obligation of the signer, unless he shows that the Bank or other party for whom he was acting has the power to execute the bond, and that he had authority to bind them.¹³

A seal is a symbol of the genuineness of the bond, and imports that the instrument was executed with deliberation.¹⁴

U. S. F. & G. Co., 42 Mont. 315; 112 Pac. 1060; Empire State Surety vs. Carroll County, 194 Fed. 593; 144 C. C. A. 435; Star Grocer Co. vs. Bradford, 74 S. E. 509; 70 W. Va. 496; Clark vs. Bank of Hennessey, 14 Okl. 572; 79 Pac. 217.

¹⁰ Hill vs. Scales, 15 Tenn. 410; Manhattan Life Ins. Co. vs. Alexander, 89 Hun 449; 35 N. Y. S. 325.

If the obligor delegates to another authority to execute a bond, he will be bound, but such authority must be in writing. Basham vs. Commonwealth, 76 Ky. 36.

¹¹ Jeffery vs. Underwood, 1 Ark. 108; Curd vs. Forts, 9 Ky. 119.

¹² Ante, Sec. 30; Smith vs. Easter, 101 Kan. 245; 166 Pac. 510.

Where the Statute of Frauds requires the writing to be "subscribed" by the party to be bound, as in New York, a printed signature is not deemed a compliance with the Statute. Vielle vs. Osgood, 8 Barb. 130; Davis vs. Shields, 26 Wend. 341; Cunningham vs. Hawkins, 128 N. W. 223; 163 Mich. 317.

¹³ Gardner vs. Cooper, 9 Kans. App. 587; 58 Pac. 230; 60 Pac. 540.

¹⁴ Seals have been employed from very ancient times, as an evidence of

authenticity. In the earliest records of history are to be found many instances of the use of the seal as a symbol of attestation.

"And I bought the field of Hana-meel and weighed him the money, even seventeen shekels of silver, and I subscribed the evidence, and sealed it, and took witnesses, and weighed him the money in the balances, so I took the evidence of the purchase, both that which was sealed according to the law and custom, and that which was open."—Jeremiah xxxii, 9-11.

The charter of Westminster, granted by Edward the Confessor, does not bear the signature of the monarch, but only his seal.

The use of individual seals bearing the family coat of arms, or other distinctive character, was a safeguard against fraud and forgery, and furnished evidence of genuineness which was of practical importance in determining the character of written instruments, in the days when the ordinary machinery of the law offered little if any protection.

Where there are several signers, one seal is sufficient to authenticate the signatures of all.¹⁵

A seal imports a consideration, and want of consideration is not a defense to a bond under seal.¹⁶

In some States the Legislature has made the seal only presumptive evidence of a consideration.¹⁷

Richard I. introduced the device of a mounted knight upon the individual seals then in use, and many curious and elaborate devices, intended to be difficult of imitation, were in common use, even down to the beginning of the 19th century.

A private seal has now no practical value as evidence of genuineness. It has been, in effect, repudiated by the Courts, which treat it as the merest formality, by recognizing as sufficient a printed scroll, in the place where the seal should be attached.

Locus Sigilli, abbreviated as "L. S.," originally intended merely to indicate the place where the seal should be put, has become a substitute for the seal itself. *Smith vs. Butler*, 25 N. H. 524.

Any mark or sign, however small, intended by the writer as a seal, will be given such effect.

In *Hacker's Appeal*, 121 Pa. 192; 15 Atl. 500, the name was followed by a dash, such as was used in the body of the instrument for the purposes of punctuation, but this was held to be sufficient as a seal.

The Legislature in a number of the States has recognized the fiction which is now represented by private seals, and abolished them altogether. This has been done in Ohio, Indiana, Iowa, Kansas, Nebraska, Tennessee, Texas, North Da-

kota, South Dakota, Montana, and Mississippi. In other States the legislation has taken the form of abolishing the distinction between sealed and unsealed instruments, as in Kentucky, California, and Oregon.

¹⁵ *Building Association vs. Cummings*, 45 O. S. 664; 16 N. E. 841; *New Orleans St. L. & C. Ry. Co. vs. Burke*, 53 Miss. 200; *Northumberland vs. Cobleigh*, 59 N. H. 250; *Warder, B. & G. Co. vs. Stewart*, 36 Atl. 88; 2 Marv. (Del.) 275.

But see *Hess's Estate*, 150 Pa. 346; 24 Atl. 676.

¹⁶ *Cosgrove vs. Cummings*, 195 Pa. 497; 46 Atl. 69; *Weber vs. Roland*, 39 Pa. Sup. Ct. 611.

Storm vs. United States, 94 U. S. 76, *Clifford, J.*: "The agreement here is under seal, and the action is an action of debt founded on the bond given to secure the performance of the agreement; and it is an elementary rule, that a bond or other specialty is presumed to have been made upon good consideration, so long as the instrument remains unimpeached."

Van Valkenberg vs. Smith, 60 Me. 97; *Harris vs. Harris*, 23 Gratt. 737; *Aller vs. Aller*, 40 N. J. L. 446; *Jerome vs. Ortman*, 66 Mich. 668; 33 N. W. 759.

¹⁷ Such Statutes have been enacted in New York, New Jersey, Michigan, Wisconsin, Oregon, and Nebraska.

§123. Delivery and acceptance are necessary to the validity of a bond.

A bond cannot take effect until delivered and accepted by the obligee. To constitute a delivery there must either be an actual manual passing of the instrument to the obligee, or to some one authorized to receive it for him, or such a disposition of it by the obligor as precludes him from further control over the bond. Such delivery must be without condition, and where a bond is put in possession of the obligee, with the stipulation it is not to take effect except upon condition, it does not become a legal delivery, and binding upon the surety, until such condition is fulfilled.¹⁸

The possession of a bond by the obligee is *prima facie* evidence of a legal delivery.¹⁹ The retention of a bond by the obligee is *prima facie* evidence of the acceptance and approval of the same.²⁰

Sureties incur no liability for default between the date of the bond and the date of delivery, unless the contract expressly provides that it shall be in force from date.

¹⁸ *Weed Sewing Machine Co. vs. Jeudevine*, 39 Mich. 590.

Where the obligee receives the bond upon condition that it is not to take effect until others sign as co-sureties. Such conditions may be shown, and the delivery is not complete. *Stuart vs. Livesay*, 4 W. Va. 45; *Spencer vs. McLean*, 20 Ind. App. 626; 50 N. E. 769; *Dunlap vs. Willett*, 153 N. C. 317; 69 S. E. 222; *Hendry vs. Cartwright*, 89 Pac. 309; *Gay vs. Murphy*, 134 Mo. 98; 34 S. W. 1091; *Hagler vs. State*, 31 Neb. 144; 47 N. W. 692; *Baker County vs. Huntington*, 46 Ore. 272; 79 Pac. 187.

See also *Whitsell vs. Mebane*, 64 N. C. 345.

¹⁹ *Wood vs. Chetwood*, 44 N. J. Eq. 64; *State vs. Suwanee Co. Commissioners*, 21 Fla. 1; *Grim vs. School Directors*, 51 Pa. 219; *Blankman vs. Vallejo*, 15 Cal. 638; *Bostwick vs. Van Voorhis*, 91 N. Y. 353; *State vs. Ingram*, 27 N. C. 441; *Kranichfelt vs. Slattery*, 33 N. Y. S. 27; *Valentine vs. Wheeler*, 116 Mass. 478.

A delivery to a third person authorized by an obligee to receive the bond, will constitute a legal delivery.

Where a bond is duly executed, but not delivered until after the death of the obligor, it will not be binding. *Fay vs. Richardson*, 7 Pick. 91; *Fiala vs. Ainsworth*, 63 Neb. 1; 88 N. W. 135. *

²⁰ *Engler vs. People's Fire Ins. Co.*, 46 Md. 322; *Union Bank of Maryland vs. Ridgeley*, 1 Har. & G. (Md.) 324; *Mallors vs. Cranc Co.*, 92 Ill. App. 514.

When a bond, carrying as a specialty does, its complete obligation with the paper, is put by the obligors into the hands of the obligee and in fact is accepted by it, notice is not necessary that a condition subsequent to the delivery by which the obligee might have made it ineffectual has not been fulfilled. The contract is complete without notice. *U. S. Fidelity Co. vs. Riefler*, 239 U. S. 17.

Where the possession is shown to be merely for the purpose of inspection, the presumption of acceptance is rebutted. *Comer vs. Baldwin*, 16 Minn. 172.

Where a bond recites that it shall run for 12 months from its date, the surety will be liable for defaults occurring between the date and the delivery.²¹

§124. Incomplete bonds — Right of the obligee to fill blanks.

The delivery of bonds in an incomplete form will generally fall within one of two classes.

Where the instrument comes to the obligee with blank spaces which must be filled in, in order that the bond may take effect, but without any direction or condition being communicated to the obligee as to what shall be placed in these blanks, or

Where the bond is delivered incomplete, but with an understanding as to how it is to be completed.

In the first of these cases, there arises an implication that the blanks may be filled by the holder in such a manner as will make the obligation binding upon the parties.²²

In the latter case, the holder is limited to the real contract, and nothing in addition to the agreement of the parties can be inserted, even though the instrument does not thereby become complete and effective, and if the holder or his agents have added conditions not agreed upon, or failed to insert stipulations as directed, the sureties under a plea denying the execution may show the real understanding of the parties.²³

²¹ *Ætna Life Ins. Co. vs. American Surety Co.*, 34 Fed. Rep. 291; *Supreme Council Catholic Knights vs. Fidelity & Casualty Co.*, 63 Fed. Rep. 48; Post Sec. 130.

See also *Oregon Ry. & Nav. Co. vs. Swinburne*, 22 Ore. 574; 30 Pac. 322.

²² *South Berwick vs. Huntress*, 53 Me. 89; *Dolbeer vs. Livingston*, 100 Cal. 617; 35 Pac. 328; *Rose vs. Douglass Township*, 52 Kan. 451; 34 Pac. 1046; *Kinney vs. Schmitt*, 12 Hun 521.

²³ *Richards vs. Day*, 137 N. Y. 183; 33 N. E. 146. In this case the parties employed a Justice of the

Peace to draft the bond, and the obligors stipulated the conditions agreed upon, and signed the bond in blank, intrusting to the Justice to fill it in as stipulated. The bond was not filled in as agreed, and being set up as a counterclaim in an action by the obligor against the obligee, held—*Earl, J.*: "If this had been a complete bond when the plaintiff signed it, although by mistake or fraud, it did not express the true agreement between the parties, his sole remedy would have been to procure its reformation, and when an effort was made to enforce the bond against

§125. The incorporation of other instruments into the bond by reference.

A bond is executed to secure some other contract between the principal and the obligee. The terms of that contract are a necessary part of the bond, and for convenience as well as to avoid mistake in the exact terms of the obligation assumed, it is usually deemed sufficient to incorporate the main contract in the bond by reference, thus making it part of the bond, the same as if fully set out.

A mere reference, however, without reciting in the bond the substance of the contract referred to, would be void for uncertainty, such as a reference to a building contract, and the plans and specifications, without designating other facts to identify what building is referred to.

If the main contract is broader in its scope than the limits fixed in the bond, a reference to the contract will only incor-

him he could not contradict the terms thereof by parol evidence, except by proper allegations in his pleading asking for its reformation. But here the plaintiff did not sign any bond. He signed a blank piece of paper, and it would have been sufficient for him on the trial to prove that he simply signed a blank piece of paper, and then it would have been necessary for the defendant to show that he authorized the blank to be filled up, and how and under what circumstances, the authority was given and what the authority was. A party who signs a blank piece of paper cannot be bound to the obligation written therein, unless it can be shown that he gave the person who wrote it authority. . . . Suppose the justice of the peace, instead of inserting payments in this bond, as agreed, had inserted therein a conveyance of real estate, or a bond for absolute payment of the principal of a large sum of

money; or, suppose the plaintiff had signed this blank bond without authorizing any one to fill it up, and some unauthorized person had afterward filled it up as it now appears; in either of these cases would the bond thus filled up and completed in form have been the bond of the plaintiff? Certainly in neither case could it have been said that the plaintiff executed such a bond.

"Here so far as the bond departed from the agreement of the parties it was not the bond of the plaintiff. The only authority the justice of the peace had was to insert in this bond the precise agreement of the parties as directed. As he did not do that this is not, in the form it now appears, the bond of the plaintiff, and under a denial that he executed the bond he may show the circumstances under which he signed his name and what the agreement at the time he signed it was."

porate so much of the same as is within the limits of the terms of the bond.^{23a}

Thus where a building contract provides for the performance of labor and the furnishing of the material, and the bond is given to secure the performance of the *labor* in accordance with the contract and specifications, which contract and specifications are made a part of the bond by reference. Such reference will not render the surety liable for default in furnishing the material.²⁴

In general the bond will be construed in accordance with the terms of the agreement as ascertained by reading together the bond and the contract to which reference is made.²⁵

^{23a} Morgan vs. Salmon, 135 Pac. 553.

²⁴ Dunlap vs. Eden, 15 Ind. App. 575; 44 N. E. 560. The bond in this case recited that the principal had entered into a contract to perform the labor and furnish the materials, but the defeasance clause in the bond reads, "Now should the aforesaid contractor *do and complete said work* as aforesaid, etc.," omitting all reference to furnishing the materials, the liability arising out of materials was considered not to be within the scope of the bond.

Noyes vs. Granger, 51 Ia. 227; 1 N. W. 519.

See also Electric Appliance Co. vs. U. S. Fidelity & Guaranty Co., 110 Wis. 434; 85 N. W. 648.

Here the Building Contract provided that the Contractor would perform the labor and furnish the materials, and would pay all claims for labor and materials. The contract also provided for the giving of a bond to secure the performance of all the covenants of the contract. The bond was conditioned for the performance of the labor, and furnishing of material, but omitted the covenant in reference to the payment of claims. It contained, however, a general clause that the contractors should "Well, truly and faithfully comply with all the terms,

covenants, and conditions of said contract on their part to be kept and performed, according to its terms."

The Court held: "The fact that the city expressly contracted that the bond given should be given for the payment of materialmen and laborers, and then accepted a bond without such a condition, is clearly a waiver of that condition of the contract, and indicates an intention to abandon or relinquish its scheme in that respect."

²⁵ Forst vs. Leonard, 112 Ala. 296; 20 South. 587; Mackenzie vs. Edinburg School Trustees, 72 Ind. 189; Boley vs. Lake Street Elevated R. R. Co., 64 Ill. App. 305; Bartlett vs. Wheeler, 195 Ill. 445; 63 N. E. 169; Hiller vs. Daman, 183 Mo. App. 317

Jordan vs. Kavanaugh, 63 Iowa 152; 18 N. W. 851. In this case the contract referred to, obligated the principal to perform the labor of constructing a railway, and to pay the claims of labor and materialmen, and the Surety was held to have assumed, by this reference, a liability for the performance of the entire contract, including the payment of labor and material claims.

City of New York vs. New York Refrigerator Co., 82 Hun 553; 31 N. Y. S. 714; Kimball Co. vs. Baker,

Where the reference is to the By-Laws of a Corporation, for a further description of the duties of an officer whose fidelity is the subject of the bond, it is held that the Sureties incorporate the by-laws into their contract.²⁶

§126. Consideration.

The main contract which the bond secures furnishes a consideration for the bond, where the one depends upon the other, such as where the obligee agrees to make a contract with the principal upon the condition that the latter will furnish a bond,²⁷ or where a contract of employment is tendered upon the condition that the employee will give a bond.

Where the By-Laws of a Bank required that its Cashier give a bond before entering upon his duties, the employment was held to be sufficient consideration for the bond.²⁸

62 Wis. 526; 22 N. W. 730; *Locke vs. McVean*, 33 Mich. 473; *State vs. Tiedemann*, 69 Mo. 515.

²⁶ *Humboldt Sav. & Loan Soc. vs. Wennerhold*, 81 Cal. 528; 22 Pac. 920.

²⁷ *Smith vs. Molleson*, 148 N. Y. 241; 42 N. E. 669.

If the main contract is for any reason not binding on the principal, the bond given to secure its performance is without consideration and not binding on the obligor. *Keith County vs. Ogalalla Power & Irrigation Co.*, 64 Neb. 35; 89 N. W. 375.

²⁸ *La Rose vs. Logansport Nat. Bank*, 102 Ind. 332; 1 N. E. 805. In this case the cashier entered upon the performance of his duties, two weeks before giving his bond, and the contention was that there was no consideration for the bond, since his employment was not made to depend upon it, and that the obligee had in effect waived the requirement for the bond by permitting him to enter upon his employment without it. The Court said: "It is further contended, that as the complaint avers that G. was appointed cashier

on the 9th day of January, 1878, and the bond was not approved until the 23d day of January, 1878, the bond was in consequence executed without consideration.

"We do not agree with this view of the case. It is averred in the complaint that a by-law of the bank, which is set out, required the cashier to execute a bond in a stipulated amount, and that in pursuance thereof the bond in suit was executed. Whether the cashier entered upon his duties before or after the bond was approved, does not clearly appear. Nor is it material. It does appear that the bond was required, and that in pursuance of such requirement, the bond in suit was executed and approved, and that G. entered upon and continued his duties as cashier. It is clearly implied, if it is not averred in terms, that he obtained and continued in office as cashier, by reason of the fact that the bond was to be and was executed. This was a sufficient consideration, and the bond was effectual and operative, at least, from the date of its approval."

A consideration cannot be founded upon a contract already executed, before the bond was required, as where after land had been conveyed by warranty deed, and an incumbrance not before known to the grantee is discovered, it was held that the purchase of the land did not amount to a consideration for the bond of indemnity, thereafter demanded and furnished by the grantor, and that the sureties were not liable, there being no new consideration.²⁹

Again where the bond to secure a building contract was not demanded until two months after the date of the contract, it was held that there was no consideration.³⁰

The mere fact that the bond was executed subsequent to the building contract, will not of itself avoid the consideration, where it is shown that the contract was made upon the condition that the bond would be furnished at a later date.³¹

A seal upon a bond imports a consideration.³² In those States where seals are abolished, and the consideration is not expressed upon the face of the bond, it may be shown by parol.³³

But where a consideration is recited in the bond it cannot be contradicted by parol.³⁴ The burden of proving a failure or lack of consideration is on the party who makes the claim.³⁵

An instrument in the form of a bond where seals are not required, although not expressing any consideration, will be

²⁹ *Peck vs. Harris*, 57 Mo. App. 467. A bond of indemnity to a Sheriff, to induce him to perform a duty enjoined upon him by law, will be void for want of consideration.

Mitchell vs. Vance, 5 T. B. Mon. (Ky.) 528.

³⁰ *Ring vs. Kelly*, 10 Mo. App. 411.

³¹ *Oberbeck vs. Mayer*, 59 Mo. App. 289; *Smith vs. Molleson*, 148 N. Y. 241; 42 N. E. 669; *Stauber vs. Ellett*, 140 Mich. 271; 103 N. W. 606.

See also *Fourth Nat. Bank vs. Spinney*, 47 Hun 293.

³² *Ante*, Sec. 123; *Patterson vs. Chapman*, 179 Cal. 203; 176 Pac. 37.

³³ *Singer Mfg. Co. vs. Forsyth*, 108 Ind. 334; 9 N. E. 372; *Miller vs. Fichthorn*, 31 Pa. 252.

³⁴ *Cocks vs. Barker*, 49 N. Y. 107; *Miller vs. Bagwell*, 3 McCord (S. C.) 429.

³⁵ *Brown vs. Kinsey*, 81 N. C. 245; *Beeson vs. Howard*, 44 Ind. 413.

Mere inadequacy of consideration without fraud or imposition, is not classed as a failure or want of consideration, and is not a defense to an action upon a bond. *Winslow vs. Wood*, 70 N. C. 430.

deemed *prima facie* to import a consideration, until the contrary is shown.³⁶

A bond given in response to a discretionary order of the court is not void for want of consideration.^{36a}

A bond executed pursuant to and in substantial conformity with the provisions of a statute needs no consideration.^{36b}

§127. Bonds obtained by fraud or misrepresentation.

The proposition that fraud vitiates all contracts must be deemed to exclude suretyship contracts, except in those cases where the creditor participates in the fraud, or makes his advances with knowledge of it.³⁷

A bond is a contract between the surety and the obligee, and will not be avoided merely by showing that it was executed by the surety relying upon misrepresentation of the principal, or that it was induced by his fraud.

If a surety signs a bond upon the condition that another is to sign as co-surety, and it is delivered by the principal to the obligee without complying with this condition, withholding from the obligee all knowledge of the condition, the delivery is fraudulent as against the surety, but he cannot be released on account of it.³⁸

The doctrine of special agency does not apply where a party holds out the principal as worthy of confidence, by intrusting him with the paper bearing his signature, coupled with no limitations, on the paper itself, as to its use. There is no equity in punishing the obligee for the misplaced confidence of the surety.³⁹

³⁶ *Luce vs. Foster*, 42 Neb. 818; 60 N. W. 1027.

In Iowa, Kansas, Tennessee, Missouri, Texas, California, Dakota, Alabama, and Florida, the Legislature has enacted that all contracts in writing import a consideration.

^{36a} *Whereatt vs. Ellis*, 103 Wis. 348; 79 N. W. 416. See also *Larsen vs. Winder*, 20 Wash. 419; 45 Pac. 563, where it is held that although the appointment of a receiver for a partnership may have been wrongful, yet a bond given by one partner in order to obtain possession of the property from the receiver is based upon a valid consideration and is binding on the obligors.

^{36b} *State vs. Paxton*, 65 Neb. 110; 90 N. W. 983.

³⁷ *Ante* Sec. 108.

³⁸ *Dangler vs. Baker*, 35 O. S.

673; *Linn Co. vs. Farris*, 52 Mo. 75; *Graves vs. Tucker*, 18 Miss. 9; *Dair vs. U. S.*, 16 Wall. 1; *Butler vs. U. S.*, 21 Wall. 272; *Belden vs. Hurlbut*, 94 Wis. 562; 69 N. W. 357; *Thomas vs. Bleakie*, 136 Mass. 568; *Title Guaranty & Surety Co. vs. Schmidt*, 213 Fed. 199.

For additional cases upon this point, see *Ante* Sec. 109.

Contra—*Guild vs. Thomas*, 54 Ala. 414.

Smith vs. Kirkland, 81 Ala. 345; 1 South. 276. This Court considers that the doctrine of equitable estoppel does not apply because of the negligence of the obligee in not making inquiry as to whether the surety signed under some condition which has not been fulfilled.

³⁹ See *People vs. Bostwick*, 32 N. Y. 445, where the doctrine of Special Agency is upheld, but in effect over-

Any active fraud of the obligee, or an acceptance of the bond with knowledge of the fraud of the principal, will release the surety, for the same reasons that apply to the defense of fraud in the making of simple contracts.⁴⁰

The concealment by the obligee of any fact material for the surety to know, and which if known to the surety might have prevented him from signing, is an act of fraud which will discharge the surety.⁴¹

ruled in *Russell vs. Freer*, 56 N. Y. 67.

⁴⁰ *Nelson vs. Howe Mach. Co.*, 10 Ky. L. Rep. 37.

Watriss vs. Pierce, 32 N. H. 560. In this case the Surety signed upon the understanding, communicated by the obligee, that by virtue of his bond, the principal was to receive \$10,000, and it was so recited in the bond. Whereas there was a contemporaneous agreement between the principal and obligee, concealed from the Surety, that the principal was to have only \$8,317. This was held a fraud upon the Surety, and he was released.

Fishburn vs. Jones, 37 Ind. 119.

See *Spencer vs. Handley*, 5 Scott (N. R.) 546.

Evidence which shows that the obligee had notice of the conditions under which the Surety signs, such as the appearance in the body of the bond of the names of sureties who do not appear as signers, would be sufficient to discharge the surety. *Pawling vs. U. S.*, 4 Cranch 219; *Ware vs. Allen*, 128 U. S. 590; 9 S. Ct. 174; *Markland vs. Kimmel*, 87 Ind. 560; *Hessell vs. Johnson*, 63 Mich. 623; 30 N. W. 209; *Mullen vs. Morris*, 43 Neb. 596; 62 N. W. 74.

Where the surety signs upon condition that another will sign as co-surety, and the principal subsequently erases the name of the ad-

ditional surety, held in *Allen vs. Marney*, 65 Ind. 398, that the obligee is chargeable with notice of the fraud. In this case the erasure was apparent.

In *Nash vs. Fugate*, 32 Gratt. 595, it was held that the fact that there were additional scrolls for the signature of other parties than those who had signed, was not sufficient notice to charge the obligee.

But see *Ordinary of New Jersey vs. Thatcher*, 12 Vroom 403. Where it is held that a delivery of a bond cannot be made upon condition; that the act of delivery merges all conditions not expressed on the face of the bond, and although the instrument is delivered upon condition that another would sign before the bond should be in force, such condition cannot be shown as a defense. *Moss vs. Riddle*, 5 Cranch 351; *Blume vs. Burrows*, 2 Ired. (N. C.) 338.

⁴¹ *Connecticut General Life Ins. Co. vs. Chase*, 72 Vt. 176; 47 Atl. 825; *Third National Bank vs. Owen*, 101 Mo. 558; 14 S. W. 632; *Remington S. M. Co. vs. Kezertee*, 49 Wis. 409; 5 N. W. 809; *Franklin Bank vs. Cooper*, 36 Me. 179; *Harrison vs. Lumbermen's Ins. Co.*, 8 Mo. App. 37; *Railton vs. Mathews*, 10 Cl. & Fin. 934; *Cooper Process Co. vs. Chicago Bonding & Insurance Co.*, 262 Fed. 66; 8 A. L. R. 1477, note.

For additional cases upon this point see *ante*, Sec. 106.

To come within this rule, however, the concealment must relate to acts of dishonesty. Mere delinquency in payments due under former employment, not amounting to default, in the nature of a conversion, will not avoid the bond.⁴²

Where the surety refuses to sign except upon the condition that another signs as co-surety, and in order to show an apparent compliance with that condition, the principal adds the name of another by forgery, this will not release the surety as against the creditor who makes advances upon the bond, without knowledge of the fraud.⁴³

§128. Parol evidence in aid of construction.

In general the liability upon a bond is limited to its recitals. The obligations cannot be enlarged or restricted by parol. The Surety is entitled not only to the protection of the ordinary rules of evidence relating to written instruments, but to the additional protection of the Statute of Frauds, whereby no action can be maintained upon a promise to pay the debt of another, unless the promise is in writing. Such promise cannot therefore rest partly in writing and partly in parol.

The purpose and intent for which the bond was executed must be deduced from the writing alone.⁴⁴ Agreements made outside the bond, wherein the obligee stipulates that the obligations will not be enforced against the surety, cannot be considered.⁴⁵

If the recitals in the bond do not show the real agreement of the parties, by reason of a mistake, such mistake cannot be shown by parol in an action brought to enforce the bond, but the correction can only be made by a Court of Equity in an action to reform the instrument.⁴⁶

⁴² Home Ins. Co. vs. Holway, 55 Ia. 571; 8 N. W. 457; Howe Mach. Co. vs. Farrington, 82 N. Y. 121.

⁴³ See Ante Sec. 108 and cases there cited.

⁴⁴ Hydraulic Press Brick Co. vs. Neumeister, 15 Mo. App. 592; Belloni vs. Freeborn, 63 N. Y. 383; American Surety Co. vs. Thurber, 121 N. Y. 655; 23 N. E. 1129.

⁴⁵ Barnett vs. Barnett, 83 Va. 504; 2 S. E. 733; Cowel vs. Anderson, 33 Minn. 374; 23 N. W. 542; McGuire vs. Gerstley, 204 U. S. 489.

⁴⁶ Cunningham vs. Wrenn, 23 Ill. 62. In this case a bond was given to secure the performance of a contract to deliver brick. By mistake the amount of brick was stated in the bond as 1,000 instead of 100,000, and in an action upon this bond, it

Where the principal and the obligee enter into an agreement, and a bond is given to secure its performance, and the bond recites some of the obligations of the main contract, but not all, the liability under the bond will be limited to the recitals, where the contract is not incorporated into the bond by reference.⁴⁷

The rules relating to parol proof in aid of construction of bonds, do not exclude such proof when tendered to explain ambiguities. The law does not favor forfeitures, and proof will be received to explain ambiguous terms, so as to make the bond effective.

Thus a person gave a bond for the faithful performance of his duties as Ticket Agent for a Railway, in a city where the obligee maintained several Ticket Offices, without reciting in the bond to which office the agent was appointed. It was held that parol proof was admissible to determine the scope and application of the bond in this respect.⁴⁸

Where words are used in a special sense, or in the vernacular of a particular business or trade, the general rules of interpretation will apply, and proof to show their special meaning will be received.⁴⁹

If the terms of the bond are doubtful and equivocal, and it is clear that some liability is intended, proof as to the construction

was held that proof was inadmissible to show this mistake.

⁴⁷ *Oregon Railway & Navigation Co. vs. Swinburne*, 22 Ore. 574; 30 Pac. 322.

⁴⁸ *Mumford vs. Memphis & C. Ry. Co.*, 70 Tenn. 393.

See also *Franklin Ave. Sav. Institute vs. Board of Education*, 75 Mo. 408; *United States Printing & Lithograph Co. vs. Powers* (N. Y.), 135 N. E. 225.

Longfellow vs. McGregor, 56 Minn. 312; 57 N. W. 926. An objection was made to this bond that it was so far defective in expression as to be a nullity and parol proof was admitted in explanation. The Court said: "On a first reading, without reference to any of the circumstances under which it was exe-

cuted, the impression, certainly, is that the instrument is so far defective that it is null. But we are bound to assume that the parties intended the instrument to be effectual, not nugatory. And if what was intended as the condition may be ascertained from the terms, read in connection with the circumstances under which, and the purposes for which, as shown by those circumstances, the bond was executed, it must be sustained."

⁴⁹ *Loug vs. Davidson*, 101 N. C. 170; 7 S. E. 758; *Hatch vs. Douglas*, 48 Conn. 116.

But see *Gatehell vs. Morse*, 81 Me. 205; 16 Atl. 662.

given the contract by the parties themselves is admissible in aid of interpretation.

This is the general doctrine of construction in written instruments, and no reason is apparent why it should not apply to a bond of indemnity.⁵⁰

Parol proof to show a fraud is always admissible where the fraud is by the procurement, or with the knowledge of the obligee.

The delivery of the bond without the signature of a co-surety, where the surety signs upon the condition that it shall not be delivered until the co-surety signs, is a fraud which can be shown by parol.⁵¹

§129. Commencement and duration of liability upon a bond.

Resort must be had to the language of the bond itself, to determine the time within which defaults must occur, in order that they may be covered by the undertaking. The bond will not be retroactive unless the contract so stipulates; it may be unlimited in duration or expire at a definite time, depending upon the language of the instrument.

In general a bond is not in force until delivered and accepted,⁵² but where the bond recites the date from which it is in force, such recital will govern, although not delivered until a later date.

Thus where a bond recited that it was made June 15th, and that it was to continue in force 12 months from that date, although not delivered and accepted until July 29th, it was held to cover defaults occurring before delivery.⁵³

⁵⁰ Chapman vs. Bluck, 5 Scotts Rep. 515; Burgess vs. Badger, 124 Ill. 288; 14 N. E. 850; Dwelley vs. Dwelley, 143 Mass. 509; 10 N. E. 468; Thompson vs. Prouty, 27 Vt. 14; Dwenger vs. Geary, 113 Ind. 106; 14 N. E. 903.

The construction which the parties themselves put upon a written contract should prevail, even against its literal meaning.

District of Columbia vs. Gallaher, 124 U. S. 505; 8 S. Ct. 585.

⁵¹ McCulloch vs. McKee, 16 Pa. 289. A claim of illegality in the consideration for a bond, may be established by parol.

Luce vs. Foster, 42 Neb. 818; 60 N. W. 1027.

⁵² Hyatt vs. Grover & Baker S. M. Co., 41 Mich. 225; 1 N. W. 1037.

⁵³ Ætna Life Ins. Co. vs. Ameri-

Where the bond recites that the principal will perform his duties as agent, and pay over all money which comes into his hands, the sureties will be liable for his default in paying over money which he had previously collected, and which he had on hand at the time the bond went into effect.⁵⁴

Where an agent, prior to the giving of a bond, misappropriates funds of his principal, and during the period covered by the bond, collects money due his principal and reports it as coming from the debtors whose collections he had previously converted, and the principal so credits it, without knowledge of the fraud, it will be deemed a defalcation under the bond.⁵⁵

If the appointment to the office or agency is for a limited time, the liability upon the bond will be limited to the same period, although the language of the bond contains no words of limitation.

Thus where a Treasurer was appointed for one year, and gave bond for the faithful discharge of the duties of his office, without specifying any time the bond was to run, it was held that no liability attached under the bond for defaults committed under subsequent re-appointments to the office.⁵⁶

Where it does not appear, either from the by-laws of the Corporation or from the contract of appointment, that the office or Agency is annual, and the bond in terms does not fix a limit,

can Surety Co., 34 Fed. Rep. 291; Supreme Council Catholic Knights vs. Fidelity & Casualty Co., 63 Fed. Rep. 48.

Contra—First National Bank vs. Briggs, 69 Vt. 12; 37 Atl. 231; Bullion Lumber Co. vs. Barnard, 131 Wis. 284; 111 N. W. 483.

⁵⁴ Mutnal Life Ins. Co. vs. Wilcox, 8 Biss. 197.

⁵⁵ American Bonding & Trust Co. vs. Milwaukee Harvester Co., 91 Md. 732; 48 Atl. 72.

Contra—State vs. Atherton, 40 Mo. 201.

⁵⁶ Welch vs. Seymour, 28 Conn. 387; Mutual Loan & Bldg. Assoc. vs. Miles, 16 Fla. 204; Savings Bank of Hannibal vs. Hunt, 72 Mo. 597; Citizens' Loan Assoc. vs. Nugent, 40 N. J. L. 215; First National Bank vs. Samuelson, 118 N. W. 81; 82

N. W. 532; Rankin vs. Tygard, 198 Fed. 795; 119 C. C. A. 591; Ulster County Sav. Bank vs. Ostrander, 163 N. Y. 430; 57 N. E. 627; Ida County Sav. Bank vs. Seidensticker, 128 Iowa 54; 102 N. W. 821; Blades vs. Dewey, 136 N. C. 176; 48 S. E. 627.

Contra—A bond conditioned for the proper performance by a cashier of his duties "for and during all the time he shall hold the said office," binds the sureties for all such time, irrespective of the fact that he is reappointed at the beginning of each year. Nestervell vs. Mohrenstecher, 76 Fed. 118; 22 C. C. A. 93.

See also Mutual Bldg. & Loan Assoc. vs. McMullen, 1 Penny (Pa.) 431. In this case the bond recited that it was given to secure the faithful performance by the Treasurer of

the sureties will be liable so long as the employment or office continues.⁵⁷

If the bond covers the duties of the office or employment for the time for which the principal is then elected, and "So long as he shall continue in office," it will cover all future re-elections,⁵⁸ but the tenure must be continuous. A vacancy in the employment, followed by a re-election will release the sureties from liability for default under the last election.⁵⁹

§130. Bonds of general indemnity.

A bond to secure the faithful performance of duty in a position of trust, operates as a security against all loss resulting from the misconduct or want of care of the principal.

"Faithful" performance of duty includes not only honesty, but also the skill and diligence implied as a condition of all contracts of employment.^{59a}

Although the agent or employee acts with the utmost fidelity, in the sense that he does not convert or misappropriate the funds of the obligee, he is nevertheless unfaithful within the meaning of bonds of general indemnity, if by his indifference to his trust, or by his negligence, a loss occurs.⁶⁰

In a bond insuring an employer against losses sustained by reason of conduct of an employee constituting embezzlement, the word "embezzlement" is to be construed broadly in its general and popular sense, rather than in a narrow and technical spirit with specific reference to the local statute; and a loss occasioned by the employee's speculating on the market in the name of the employer, but without his knowledge or consent, is within the protection of the bond.^{60a}

If the trust funds are taken from him by violence, not induced by his want of care, or by inevitable accident, the sureties will not be liable.⁶¹

his duties during his "continuance in office," but it was held to be limited to one year, since the charter and By-laws of the Association required the Treasurer to be elected annually. *O'Brien vs. Murphy*, 175 Mass. 253; 56 N. E. 283.

See also *State vs. Mann*, 34 Vt. 371.

⁵⁷ *Union Bank vs. Ridgely*, 1 Har. & Gill (Md.) 324; *Dedham Bank vs. Chickering*, 3 Pick. 335; *Merchants Bank vs. Honey*, 58 Kan. 603; 50 Pac. 871; *Wapello State Savings Bank vs. Colton*, 110 N. W. 450.

⁵⁸ *People's Bldg. & Loan Assoc. vs. Wroth*, 43 N. J. L. 70; *Ulster County Savings Bank vs. Young*, 161 N. Y. 23; 55 N. E. 483.

⁵⁹ *Middlesex Mfg. Co. vs. Lawrence*, 83 Mass. 339; *Coombs vs. Harford*, 99 Me. 426; 59 Atl. 529; *Lexington & West Cambridge R. R. vs. Elwell*, 90 Mass. 371.

^{59a} *Citizens Trust, etc., Co. vs. Globe, etc., Fire Insurance Co.*, 229 Fed. 326; Ann. Cas. 1917C, 416, note, "Act or Default of Employee Covered by Fidelity Bond or Insurance."

⁶⁰ *Union Bank vs. Forrest*, 3 Cranch (C. C.) 218; *Barrington vs. Bank of Washington*, 14 Serg. & R. 405; *Frink vs. Southern Express Co.*, 82 Ga. 33; *Engler vs. People's Fire Insurance Co.*, 46 Md. 322; *Citizens' Bank vs. Wiegand*, 12 Phila. Rep. 496.

^{60a} *Mitchell Grain & S. Co. vs. Maryland Casualty Co.*, 108 Kan. 379; 195 Pac. 978; 16 A. L. R. 1488, 1493, note.

⁶¹ *Huntsville Bank vs. Hill*, 1 Stew. (Ala.) 201; *Chicago, B. & Q. Ry. vs. Bartlett*, 120 Ill. 603; 11 N. E. 867; *B. & O. Ry. vs. Jackson*, 3 Atl. Rep. (Pa.) 100.

Neither will the sureties be liable for defaults committed by subordinates of the principal, where such subordinates are appointed by the obligee.⁶²

General indemnity for faithful performance of duty includes more than the prescribed duties of the employment.

If the agent or employee acts outside the scope of his employment, but under color of his office or position, and loss results to the obligee, the sureties will be liable.⁶³

Where the law prohibits an officer of the bank from borrowing from his own bank, it is a violation of his official duty to receive such loan, and a failure to repay the loan so made, creates a liability against the sureties on his bond.⁶⁴

§131. Bonds to secure building contracts, with covenants for the payment of labor and material claims.

In general a bond to secure the performance of a building contract, with a covenant to pay all labor and material claims, will bind the surety to pay such claims, and recovery may be had at the suit of the claimants themselves.⁶⁵

The obligee in a building contract has a right not merely to require his building to be completed in a manner and at the time

⁶² Chicago & A. R. R. Co. vs. Higgins, 58 Ill. 128.

In *La Rose vs. Logansport Nat. Bank*, 102 Ind. 332; 1 N. E. 805, the funds were in charge of the cashier, but other officers of the bank had the right of access to the funds, and it was held that the sureties of the cashier were not liable for the misconduct of the other officers.

⁶³ *German Bank vs. Auth*, 87 Pa. 419; *Rochester City Bank vs. Elwood*, 21 N. Y. 88; *Walden Nat. Bank vs. Birch*, 130 N. Y. 221; 29 N. E. 127; *Pendleton vs. Bank of Kentucky*, 1 T. B. Mon. 171; *Humboldt Savings & Loan Society vs. Wennerhold*, 81 Cal. 528; 22 Pac. 920.

But see *Sperry vs. Dransfield*, 2 New Zealand (S. C.) 319, where it is held that a surety upon a fidelity bond given by an officer of a society is not liable for the conversion of funds which, under the rules of the society, should not have been paid to the officer.

⁶⁴ *McShane vs. Howard Bank*, 73 Md. 135; 20 Atl. 776.

⁶⁵ See *post*, Sec. 142.

Sepp vs. McCann, 47 Minn. 364; 50 N. W. 246; *Salisbury vs. Keigher*, 47 Minn. 367; 50 N. W. 245; *Lyman vs. City of Lincoln*, 38 Neb. 794; 57 N. W. 531; *Doll vs. Crume*, 41 Neb. 655; 49 N. W. 806; *King vs. Downey*, 24 Ind. App. 262; 56

N. E. 680; *American Surety Co. vs. Raeder, Assignee*, 15 O. C. C. 47; *Henry vs. Ankrim*, 39 Law Bul. (O.) 78; *United States vs. Burgdorf*, 13 App. D. C. 506; *St. Louis vs. Von Puhl*, 133 Mo. 561; 34 St. W. 843; *Jordan vs. Kavanaugh*, 63 Iowa 152; 18 N. W. 851; *Baker vs. Bryan*, 64 Iowa 561; 21 N. W. 83; *Indemnity Co. vs. Granite Co.*, 100 O. S. 373; 126 N. E. 405; *State, ex rel., Marble Cliff Quarries Co. vs. Watts*, 100 O. S. 380; 126 N. E. 407; *Alexander Lumber Co. vs. Aetna Co.*, 296 Ill. 500; 129 N. E. 871; *Forburger Stone Co. vs. Lion Bonding & Surety Co.*, 103 Neb. 202; 170 N. W. 897; 171 N. W. 288; *Equitable Surety Co. vs. U. S.*, 234 U. S. 448; *Concrete Steel Co. vs. Illinois Surety Co.*, 163 Wis. 41; 157 N. W. 543.

Contra—*Fosmire vs. National Surety Co.*, 229 N. Y. 44; 127 N. E. 472; *First M. E. Church vs. Isenberg*, 246 Pa. St. 221; 92 Atl. 141.

But see *Wilson vs. Whitmore*, 92 Hun 466; 36 N. Y. S. 550. Affirmed 157 N. Y. 693; 51 N. E. 1094.

Parker vs. Jeffery, 26 Ore. 186; 37 Pac. 712. Holding that the rule giving to third parties, the benefit of a contract to which they are not parties, is limited to those contracts which have for their primary object the benefit of a third person.

agreed upon, but also that it shall be delivered to him free from the liens of those who furnish labor and material in its construction.

See also *Simson vs. Brown*, 68 N. Y. 355; *Durnherr vs. Rau*, 135 N. Y. 219; 32 N. E. 49; *Electric Appliance Co. vs. U. S. Fidelity & Guaranty Co.*, 110 Wis. 434; 85 N. W. 648.

In *City of Philadelphia vs. Madden*, 23 Pa. Co. Ct. Rep. 39, it was held that a Municipality has no right to require a contractor to furnish a bond, conditional upon the payment of labor and materials by the Contractor, and that such bond can not be enforced against the surety.

See also *Kansas City Sewer Pipe Co. vs. Thompson*, 120 Mo. 218; 25 S. W. 522. The holding in this case is based upon the absence of specific authority in the city charter to make a contract for the benefit of a third party. "As the city was not liable for the material and no lien could be asserted against her by plaintiff, it is very clear that it was not essential to the exercise of its charter right to construct sewers, that it should have the implied power to contract for plaintiff's benefit."

See also *City of Kansas vs. O'Connell*, 99 Mo. 357; 12 S. W. 791; *Breen vs. Kelly*, 45 Minn. 352; 47 N. W. 1067; *Park Bros. & Co. vs. Sykes*, 67 Minn. 153; 69 N. W. 712; *Becker vs. Keokuk Water Works*, 79 Iowa 419; 44 N. W. 694.

As to the authority of a municipality to require a contractor to give a bond conditioned upon the payment of labor and material claims. See remarks of *Cooley, C. J.*, in *Knapp vs. Swaney*, 56 Mich. 345; 23 N. W. 162.

The Act of Congress of August 13, 1894, ch. 280, amended by Act of February 24, 1905, ch. 778, 33 Stat. L. 811 (U. S. Comp. St. 1916, Sec. 6923), provides that a contractor on government works shall give the usual surety bond with the additional obligation that he shall promptly pay all persons supplying labor or materials in the prosecu-

tion of the work. The Act then provides for a suit on this bond by such materialmen, stating that the suit shall be brought in the federal court for the district in which the contract was to be performed "and not elsewhere." The government may bring suit within six months from the date of completion of the contract, during which period no suit may be instituted by materialmen, though they may intervene in any suit brought by the government. Only one action is to be brought, all other claimants intervening in that action. *Brogan vs. National Surety Co.*, 246 U. S. 257.

The purpose of the amendment was merely to secure to the United States preference over others in the satisfaction of its claim against the contractor. *Illinois Surety Co. vs. Peeler*, 240 U. S. 214, 218. It was pointed out in *Mankin vs. Ludowici-Celadon Co.*, 215 U. S. 533, 538, that "In respect to the condition of the bond required to be given, the language of the amended act is precisely the same as that contained in the act of August 13, 1894;" and in *Hill vs. American Surety Co.*, 200 U. S. 197, 201, that "In respect to the persons entitled to the benefit of the bond there has been no material change in the act."

The Supreme Court has repeatedly refused to limit the application of the act to labor and materials directly incorporated into the public work. Thus in *Title Guaranty & Trust Co. vs. Crane Co.*, 219 U. S. 24, 34, the claims for which recovery was allowed under the bond included not only cartage and towage of material, but also claims for drawings and patterns used by the contractor in making molds for castings which entered into the construction of the ship. In *United States Fidelity Co. vs. Bartlett*, 231 U. S. 237, where the work contracted for was building a breakwater, recovery was allowed for all the labor at a quarry opened fifty miles away. This in-

The bond given to secure the owner in these rights may assume the form of an undertaking to complete the building if the contractor does not, and to pay the labor and material claims if

cluded, as the record shows, the labor not only of men who stripped the earth to get at the stone and who removed the debris, but carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment; and who repaired the tracks upon which the cars moved. And the claims allowed included also the wages of stablemen who fed and drove the horses which moved the cars on those tracks. In *Illinois Surety Co. vs. John Davis Co.*, 244 U. S. 376, recovery was allowed not only for the rental of cars, track and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment and the freight paid thereon to transport it to the place where it was used. As shown by these cases, the act and the bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work.

Questions of liability to pay interest under bond to secure payment for labor and materials, furnished under construction contract with United States, are determinable by law of State in which contract and bond were made and to be performed. *Ill. Surety Co. vs. John Davis Co.*, 244 U. S. 376. See also 92 *Central Law Journal* 227, "Extent of Liability on Surety Bonds Given by Contractors for U. S. Government Work."

United States vs. National Surety Co., 34 C. C. A. 526; 92 *Fed. Rep.* 549, *Thayer, J.*: "It is a familiar rule of law that the contract of a surety must be strictly construed, and that it can not be enlarged, by construction, and that when a bond, with sureties, has been given to secure the performance of a contract, and the principal in the bond and the person for whose benefit it was given make a material change in

the contract without the consent of the surety, the latter is thereby discharged. For present purposes, it may be conceded that the finding of the lower court in the case at bar discloses such a modification of the original contract between Prosser and the United States as would fall within the rule last stated, and release the defendant company from its liability, if the United States was suing for its own benefit for a breach of some provision of the contract, the due performance of which the bond was intended to secure . . . The condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, Congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. The bond which is provided for by the act was intended to perform a double function,—in the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for

the contractor defaults in that respect. Or it may take the form of an obligation to save the owner harmless from all loss resulting from a breach by the contractor of any of the covenants of the building contract.

In the one case, it is an obligation to pay such a sum of money as is necessary to carry out in full all the covenants of the building contract, and in the other, it is an obligation to pay such damages as are ascertained to result from the default of the contractor, without regard to the specific performance of his contract.^{65a}

The undertaking to pay labor and material claims is enforceable, whether mechanic's liens representing such claims are perfected or not, whereas, an obligation to save harmless from such claims only becomes a liability when these claims result in a lien upon the property.

If the owner pays labor and material claims to prevent liens

the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience. In view of these considerations, we are of the opinion that the sureties in a bond, executed under the act now in question, cannot claim exemption from liability to persons who have supplied labor or material to their principal to enable him to execute his contract with the United States."

Dewey vs. State ex rel. McCollum, 91 Ind. 173; *Conn vs. State ex rel. Stutsman*, 125 Ind. 514; 25 N. E. 443; *Doll vs. Crume*, 41 Neb. 655; 59 N. W. 806; *Kaufman vs. Cooper*, 46 Neb. 644; 65 N. W. 796; *Steffes vs. Lemke*, 40 Minn. 27; 41 N. W. 302.

It is said that the double function contemplated by this statute involves a double liability on the bond, and that each obligee can recover the full amount of the penalty from the surety.

In *Griffith vs. Rundle*, 23 Wash. 453; 63 Pac. 199, a government contractor being in default, the surety completed the contract and expended in so doing a sum in excess of the

penalty on the bond, and was thereafter sued upon the bond by material and labor claimants, and recovery was allowed. The Court said: "The practical effect of the statute, and others of similar character, in a number of states, seems to be to confer a special lien in favor of such persons who furnish labor and material, and to substitute the bond in the place of the public building as a thing upon which the lien is to be charged. Such liens evidently appear, from an inspection of the current legislation, to be favored, and the Courts have usually adopted a liberal rule of construction in their enforcement."

^{65a} *V. eightman vs. National Trust Co.*, 208 Pa. 449; 57 Atl. 879. In this case the bond was given to a mortgagee to indemnify him against loss or damage resulting from the failure of the principal to erect certain buildings upon the mortgaged premises and to make certain street improvements, and it is held that the bond created no liability to pay for the cost of erecting the buildings or installing the street improvements—but merely a liability to pay the deficiency caused by the impairment of the security because of the failure to perform the contract.

being perfected, the sureties upon the bond to "save harmless from liens," or to turn over the building "free from liens for labor and material," will not be liable. The obligee by preventing the happening of the condition which forfeits the bond, has deprived himself of recourse to the bond, since by strict construction there has been no breach of the terms of the bond, and furthermore, the obligee cannot show to a certainty that the labor or materialmen would have perfected their liens within the time limited by law, even if their claims had not been paid.⁶⁶

Where the bond recites that it is to indemnify the owner against liens and "all money which he may pay to other persons on account of the work," it was held that the sureties were liable for advancements made by the owner in payment of labor and material to prevent liens.⁶⁷

A bond given to a mortgagee to indemnify him against liens which may arise in the construction of a building upon mortgaged premises, was held not to be an undertaking for the benefit of lien holders, and enforceable by them, but was limited to such damages as result to the mortgagee by reason of the liens, and that if the security was not impaired, there would be no liability upon the bond even though the liens attached.⁶⁸

A bond merely to save the owner harmless against liens is not available to the lien holders.⁶⁹

§132. Alteration of the principal contract as a defense to sureties upon the bond.

A material alteration in a contract secured by bond will release the bond. Sureties cannot be held for a default in the performance of duty, where such duty is not in terms specified, either in the undertaking itself, or by reference to the main contract, and the equities of suretyship will not permit alteration of these duties, without the consent of the surety, except upon the condition of his discharge.

⁶⁶ Bell vs. Paul, 35 Neb. 240; 52 N. W. 1110.

Where the condition of the bond is against actual loss, the plaintiff not having sustained any loss can not recover. Sheard vs. U. S. Fidelity & Guaranty Co., 58 Wash. 29; 107 Pac. 1024. But if the bond is against liability, outstanding claims not being paid are a liability even though no lien has been filed. Stuart vs. Carter, 79 W. Va. 92; 90 S. E. 537; Trinity Parish vs. Aetna Indemnity Co., 37 Wash. 515; 79 Pac. 1097. To enable the obligee to re-

cover there must be involved as an essential element the right to recover damages which have or may be suffered by reason of the failure to pay the claims. Village of Argyle vs. Plunkett, 226 N. Y. 306; 124 N. E. 1.

⁶⁷ Oberbeck vs. Mayer, 59 Mo. App. 289.

⁶⁸ American Bldg. & Loan Assn. vs. Waleen, 52 Minn. 23; 53 N. W. 867.

⁶⁹ Stetson & Post Mill Co. vs. McDonald, 5 Wash. 496; 32 Pac. 108.

Such a rule is to be upheld, either upon the ground of increase of the risk to the surety, or that the contract so changed was not the one which the Surety agreed to stand good for, and therefore he should be released, whether the risk has been increased or not.⁷⁰

Changes in a building contract which impose additional duty upon the contractor, and which are not anticipated by terms of general waiver in the bond, will discharge the sureties.⁷¹

Bonds to secure the faithful performance of duty by persons in a position of trust, will be released by a change in the office or employment, whereby new contract relations are assumed between principal and obligee.

Such as where an Assistant Bookkeeper in a Bank gives a bond, and subsequently is promoted to the position of Discount Clerk. Defalcations in the latter employment, although within the period covered by the bond, were held not to be a breach of the contract.⁷²

⁷⁰ *Ante*, Sec. 72.

A corporation engaged in the business of suretyship for profit can not successfully defend a suit merely by showing a change in the contract, whether beneficial or otherwise, as in the rule of ordinary suretyship, but must prove that the change is material and prejudicial. *City of Philadelphia vs. Ray*, 266 Pa. 345; 109 Atl. 689.

⁷¹ *Judah vs. Zimmerman*, 22 Ind. 388.

⁷² *Baltimore First Nat. Bank vs. Gerke*, 68 Md. 449.

See also *American Telegraph Co. vs. Lennig*, 139 Pa. 594; 21 Atl. 162; *Garnett vs. Farmers' Nat. Bank*, 91 Ky. 614; 16 S. W. 709; *Manufacturers' Nat. Bank vs. Dickerson*, 41 N. J. L. 448; *National Mechanics' Banking Assn. vs. Conkling*, 90 N. Y. 116.

Here the language of the bond was "Shall faithfully fulfill and discharge the duties committed to and the trusts reposed in him as such bookkeeper and shall also faithfully fulfill and discharge the duties of any other office, trust or employment, relating to the business of said association which may be as-

signed to him, or which he shall undertake to perform."

This was construed to be limited to the duties of the principal as bookkeeper, or in any other position of trust in the bank which he might temporarily perform while holding the position of bookkeeper, but not to include his faithful performance of duty as Receiving Teller to which he was promoted.

Earl, J.: "The sureties undertook for the fidelity of their principal only while he was bookkeeper; but if while bookkeeper the duties of any other office, trust or employment relating to the business of the bank were assigned to him, their obligation was also to extend to the discharge of those duties. While bookkeeper he might temporarily act as teller or discharge the duties of any other officer during his temporary illness or absence, or he might discharge any other special duty assigned to him, and while he was thus engaged the bank was to have the protection of the bond.

But it is not a defense to the surety that the risk is increased by additional duties imposed on the principal as an incident to the enlargement of the business.⁷³ Neither will the sureties be discharged by an addition of new duties which do not modify or abrogate the duties recited in the bond, nor interfere with their due performance.⁷⁴

It has been held that where an agent executed a bond to indemnify his principal against loss while acting as agent in a cer-

There are no words binding the sureties in case of the appointment of their principal to any other office. They might have been willing to be bound for him while he was bookkeeper, or temporarily assigned to the discharge of other duties, but yet not willing to be bound if he should be appointed teller or cashier and as such placed in the possession or control of all the funds of the bank. . . . A surety is never to be implicated beyond his specific engagement, and his liability is always *strictissimi juris* and must not be extended by construction."

Detroit Savings Bank vs. Ziegler, 49 Mich. 157; 13 N. W. 496; Northwestern Nat. Bank vs. Kean, 14 Phila. Rep. 7.

See also Union Dime Savings Institute vs. Neppert, 51 Hun 640; 21 N. Y. S. R. 723. Where the language of the bond was, "shall faithfully and honestly discharge his duties as such Clerk, or in whatever capacity he may serve said Bank." This recital was deemed broad enough to cover the defalcations of the principal in his office as teller to which he was promoted.

To the same effect see Fourth Nat. Bank vs. Spinney, 120 N. Y. 560; 24 N. E. 816.

The distinction has been made in

many cases between a promotion to a higher office, and a temporary assumption of the duties of another office. In the latter case, the sureties upon the bond will be liable for defalcations of the principal while temporarily discharging the duties of another.

Johnson vs. Eaton Milling Co., 18 Col. 331; 32 Pac. 825; Third Nat. Bank vs. Owen, 101 Mo. 558; 14 S. W. 632; Wallace vs. Exchange Bank, 126 Ind. 265; 26 N. E. 175.

⁷³ Eastern Railroad Co. vs. Loring, 138 Mass. 381. In this case the principal was a Ticket Agent, and the Railway extended its connections, thus increasing the business of the office. This was held not to be an alteration of the contract of employment.

But see Grocers' Bank vs. Kingman, 16 Gray 473, where an increase in the capital stock of the bank from \$300,000 to \$750,000 was considered as being a ground for discharging the sureties of the cashier by reason of the increase of his responsibilities. The principal of this case is distinctly repudiated in Lionberger vs. Krieger, 88 Mo. 160.

⁷⁴ Harrisburg Sav. & Loan Assn. vs. U. S. Fidelity & Guaranty Co., 197 Pa. 177; 46 Atl. 910.

tain territory that the sureties will not be liable for his defaults in a new territory assigned to him.⁷⁵

A change in the amount of the compensation of the principal, while amounting to an alteration in the main contract, in a sense, is not, however, such an alteration as comes within the rule which discharges the surety.⁷⁶

Where a bond recites the salary of the office or appointment, a reduction of the salary without the consent of the surety, will discharge the latter.⁷⁷

§133. Alterations in bond as a defense to the sureties.

Alterations in a bond, after delivery, without the consent of the surety, will discharge the latter, if such alterations are material.

The test of materiality is whether the liability under the bond has been increased or diminished. Even alterations which are beneficial to the surety will vitiate the bond. This rests mainly on grounds of public policy, which requires that the integrity of written instruments be preserved, by making the penalty sufficient to deter those having the custody of such writings, and who are the beneficiaries, from mutilating or in any way changing their identity.⁷⁸

There is also a sufficient justification for the rule in the inherent equities of suretyship, whereby the obligations are strictly construed, and the promisor held only upon the exact terms of his undertaking.⁷⁹

⁷⁵ *Wheeler & Wilson Mfg. Co. vs. Brown*, 65 Wis. 99; 25 N. W. 427; *White S. M. Co. vs. Mullins*, 41 Mich. 339; 2 N. W. 196.

⁷⁶ *Frank vs. Edwards*, 8 Welsb. H. & G. 214, *Parke, B.*: "If the sureties had thought that the amount of the salary was an essential ingredient in the contract, they ought to have taken care to have had a stipulation inserted in the condition of the bond, that they would be lia-

ble only so long as the overseer was continued at the same salary."

Amicable Mut. Life Ins. Co. vs. Sedgwick, 110 Mass. 163.

⁷⁷ *North Western R. R. Co. vs. Whinray*, 10 Ex. 77.

⁷⁸ *Ante* Sec. 79.

⁷⁹ *Anderson vs. Bellenger*, 87 Ala. 334; 6 South. 82, *McClellan, J.*: "The contract of suretyship must be strictly construed in favor of the surety. His obligation is volun-

Changes in a bond which are not material do not release the sureties, as where words are added for the purpose of a more complete description of the subject matter of the bond,⁸⁰ or an extension of the language to include specifically that which is already implied in the tenor of the bond.⁸¹

An interlineation made by a stranger is a mere act of spoliation, and will not invalidate the bond.⁸²

Alterations apparent upon the face of the bond will be presumed to have been made before delivery.⁸³

A restoration of the instrument to its original condition will not revive the liability against the surety, except where the alteration was without fraudulent intent. In such cases the bond may be restored and the surety held.⁸⁴

§134. Surety upon bond estopped from denying the recitals of the bond.

A party to a contract cannot be permitted to deny, or offer proof to controvert that which he has affirmed in the contract.

Estoppel is an obstacle imposed by law to prevent one from denying the truth of a statement which he has led another to believe is true, and who has acted upon that belief.

tary, without any consideration moving to him, without benefit to him, entered into for the accommodation of his principal, and generally, also, for that of the obligee; and courts see to it that his liabilities thus incurred are not enlarged beyond the strict letter of his undertaking. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. His contract cannot be changed in any respect. Whether an alteration is or is not to his benefit, is not open to inquiry."

⁸⁰ Rowley vs. Jewett, 56 Iowa 492; 9 N. W. 353.

⁸¹ Western Bldg. & Loan Assn. vs. Fitzmaurice, 7 Mo. App. 283.

⁸² White Sewing Mach. Co. vs. Dakin, 86 Mich. 581; 49 N. W. 583; Schlageek vs. Widbalm, 59 Neb. 541; 81 N. W. 448

⁸³ Xander vs. Commonwealth, 102 Pa. 434.

But see Nesbitt vs. Turner, 155 Pa. 429; 26 Atl. 750, where the alteration was of such a character that it was held to raise the presumption of an alteration after delivery.

Westmoreland vs. Westmoreland, 92 Ga. 233; 17 S. E. 1033; Dangel vs. Levy, 1 Idaho 722; Brand vs. Johnrawe, 60 Mich. 210; 26 N. W. 883.

⁸⁴ Rogers vs. Shaw, 59 Cal. 260.

In applying the doctrine of estoppel, it is wholly irrelevant as to whether the recitals are true or not, if it is shown that the representation has in fact been acted upon.

A surety upon a bond is estopped from denying that the contract between the principal and obligee has been duly executed, where such execution is recited in the bond, even though there is no binding contract by reason of the fact that the parties failed to sign the same.⁸⁵

Where the bond recites that the principal has been appointed as agent, or to some other position of trust, the surety will be estopped from denying the appointment;⁸⁶ and where the date of the agency is set out in the bond, it is conclusive upon the surety, and it cannot be shown that the agency did not go into effect on that date, whatever the fact may be.⁸⁷

Again, where a bond recited the words, "Sealed with our seals" it was shown that the seal was affixed after the signing, and without the authority of the obligor, and the defense was that the adding of the seal constituted a material alteration, it was held that the surety was estopped from denying that he did not himself affix the seal.⁸⁸

But if the seals have not in fact been affixed before delivery, a recital in the bond that it was sealed by the surety will not operate as an estoppel against showing that it was delivered unsealed.⁸⁹

Where a bond recites that the contract had been executed as of one date, the sureties are estopped from asserting that the contract was actually signed on some other date.^{89a}

If the instrument was executed by a Corporate name, the obligor is estopped from denying the Corporate capacity.⁹⁰

Where the recital is immaterial to the object and purpose of

⁸⁵ *Hayden vs. Cook*, 34 Neb. 670; 52 N. W. 165; *Price vs. Scott*, 13 Wash. 574; 43 Pac. 634.

⁸⁶ *Phenix Ins. Co. vs. Findley*, 59 Iowa 591; 13 N. W. 738; *Lionberger vs. Krieger*, 88 Mo. 160; *State Bank vs. Chetwood*, 8 N. J. L. 1; *Hauenstein vs. Gillespie*, 73 Miss. 742; 19 South. 673; *Henry County vs. Salmon*, 201 Mo. 136; 100 S. W. 20.

⁸⁷ *Washington Co. Ins. Co. vs. Colton*, 26 Conn. 42.

⁸⁸ *Metropolitan Life Ins. Co. vs. Bender*, 124 N. Y. 47; 26 N. E. 345. *Contra*—*Town of Barnet vs. Abbott*, 53 Vt. 120.

⁸⁹ *State vs. Humbird*, 54 Md. 327; *Taylor vs. Glaser*, 2 Serg. & Rawle 502.

^{89a} *Red Wing Sewer Pipe vs. Donnelly*, 102 Minn. 192; 113 N. W. 1. ⁹⁰ *Keen vs. Whittington*, 40 Md. 489.

the bond, it does not preclude the party signing from showing the truth.⁹¹

If the bond does not speak the truth by reason of fraud, the recitals may be contradicted.⁹²

§135. Measure of damages upon breach of the conditions of a bond.

The early construction of a bond to secure a private obligation was that the obligee was entitled to a decree in equity directing the obligor to specifically perform the act set out in the bond, with an alternative order, that upon default of such specific performance, he be required to pay the sum named as penalty as liquidated damages.⁹³

It was, however, enacted by statute in England, that in all actions upon bonds, the jury should assess the damages caused by the breach, and judgment should be rendered for the penal sum named in the bond, but upon payment of the sum assessed as damages, there should be a stay of execution, and the judgment should stand as a security for future breaches.⁹⁴

This Statute was construed to mean that a bond was holden only for the damages actually sustained, without regard to the amount named as penalty; and it became the rule in equity that nothing should be recovered in an action upon a bond, except the damages shown to have been sustained by a failure to perform the collateral act.⁹⁵

The English Common Law construction of this class of bonds, has always been in force in the United States, and whenever the amount of damages sustained by the obligee is capable of ascertainment, and the parties have not expressly declared the penalty to be a liquidated amount, the rule is,

⁹¹ Reed vs. McCourt, 41 N. Y. 435.

⁹² Wheeler vs. Meyer, 95 Mich. 36; 54 N. W. 689.

But see Kuriger vs. Joest, 22 Ind. App. 633; 52 N. E. 764; 54 N. E. 414.

⁹³ Holtham vs. Ryland, 1 Eq. Cases Abr. 18, pl. 8; Parks vs. Wilson, 10 Mod. 515; Hobson vs. Trevor, 2 P. Wms. 191.

⁹⁴ 8 and 9 Wm. III, c. 11, Sec. 8.

⁹⁵ Hardy vs. Bern, 5 T. R. 540.

Beckham vs. Drake, 2 H. L. 579, Parke, B. (629): "That statute in effect makes the bond a security for the damages really sustained."

Hurst vs. Jennings, 5 Barn. & Cr. 650; Grey vs. Friar, 15 Q. B. 891.

that the amount named in the bond is intended as a mere security fixing the limit of liability, and only so much of the penalty is recoverable as adequately covers the damages sustained.⁹⁶

The authorities, both of this country and England, now establish the rule, that a penalty inserted in a bond to secure the performance of a collateral object, is accessory only to the main purpose of the transaction, and if the character of the collateral act is such that compensation can be made in damages for its breach, the recovery must be limited to such damages, and if no injury is shown, nominal damages only are recoverable.⁹⁷

All damages resulting from the breach of the bond may be

⁹⁶ Davis vs. Gillett, 52 N. H. 126; Rawlings vs. Adams, 7 Md. 26; Wright vs. Wright, 49 Mich. 624; 14 N. W. 571; Longfellow vs. McGregor, 61 Minn. 494; 63 N. W. 1032; Hirt vs. Hahn, 61 Mo. 496; People's Bldg. & Loan Assn. vs. Wroth, 43 N. J. L. 70.

City of Aberdeen vs. Honey, 8 Wash. 251; 35 Pac. 1097.

Where the bond is to secure the payment of an annuity, it was held that the damages recoverable upon a breach consist of the payments in default, and not the penal sum named in the bond. Cairnes vs. Knight, 17 O. S. 69; Salo vs. Pacific Coast Casualty Co., 95 Wash. 109; 163 Pac. 384; L. R. A. 1917D, 613, note.

So also where the bond is to secure the payment of premiums upon a policy of life insurance, the damage for the breach was considered as the amount of the unpaid premiums, and not the value of the policy which lapsed by reason of the non-payment.

Scott vs. Phillips, 140 Pa. 51; 21 Atl. 241.

But in Girard vs. Cowperthwait, 21 N. Y. S. 1092, the view was taken that a non-payment of premiums resulting in a lapse of the policy raises an obligation upon the bond

for the full amount of the policy, up to the amount of the stipulated penalty named in the bond.

⁹⁷ Tate vs. Booe, 9 Ind. 13; Rawlings vs. Adams, 7 Md. 26; Linder vs. Lake, 6 Iowa 164; Fidelity & Deposit Co. vs. Colvin & Jackson, 83 Mo. App. 204; Wallis vs. Keeney, 88 Ill. 370; Karr vs. Peter, 60 Ill. App. 209; Shattuck vs. Adams, 136 Mass. 34; Sprague vs. Wells, 47 Minn. 504; 50 N. W. 535; Turck vs. Marshall Silver Mining Co., 8 Col. 113; 5 Pac. 838.

State vs. Atherton, 40 Mo. 209. In this case the principal was in default as an officer of the bank at the time of the execution of his bond. He subsequently falsified his accounts in order to conceal his defalcation. This was a technical violation of his bond, but of itself no damage to the bank, as the defalcation had already been committed, and it was held that the obligee could only recover nominal damages.

Contra—Taylor vs. Mygatt, 26 Conn. 184. Holding that not even nominal damages could be recovered for breach of a bond where no injury is shown.

recovered, although such damages accrue in part after the commencement of the action.⁹⁸

If the parties intend the sum named in the bond to be treated as liquidated damages, such ascertained intention will be enforced.⁹⁹

Whether or not the parties to a written instrument intend the sum named as damages for its violation shall be considered as liquidated or as a penal security, depends upon the terms used to express the agreement, the circumstances surrounding the making of the contract, and the subject matter of the contract, all of which are proper elements of proof.¹⁰⁰

If the purpose of the parties to a bond in fixing the amount of damages to be paid is merely to secure prompt performance of the agreement the bond will be treated as a penal one, and no more than actual damages will be recoverable on a breach.^{100a}

Stipulations in building contracts for the payment of a fixed sum per day for each day of delay beyond the date agreed upon in the contract, amount to liquidated damages, and may be recovered without regard to the actual loss resulting from the breach.¹⁰¹

⁹⁸ Spear vs. Stacy, 26 Vt. 61.

⁹⁹ Houghton vs. Pattee, 58 N. H. 326; Monmouth Park Assn. vs. Wallis Iron Works, 55 N. J. L. 132; 26 Atl. 140.

¹⁰⁰ Hosmer vs. True, 19 Barb. 106; March vs. Allabough, 103 Pa. 335; Hurd vs. Dunsmore, 63 N. H. 171; Bigony vs. Tyson, 75 Pa. 157; Westfall vs. Albert, 212 Ill. 68; 72 N. E. 4.

^{100a} Westfall vs. Albert, 212 Ill. 68; 72 N. E. 4.

¹⁰¹ Downey vs. O'Donnell, 86 Ill. 49; Louis vs. Brown, 7 Ore. 326; Louisville Water Co. vs. Youngstown Bridge Co., 16 Ky. Law Rep. 350; Westerman vs. Means, 12 Pa. 97; Curtis vs. Brewer, 17 Pick. 513.

In addition to the ground that the form of the bond, and the apparent intent of the parties is to treat the penalty as liquidated in this class of bonds, there is an additional reason for so construing the contract, in that the actual damage resulting from delay in the performance of a contract, in many cases, cannot be ascertained, and in their nature are

so uncertain as to raise an implication of an intent to treat the damage as liquidated. Such has been the basis of many holdings.

Collier vs. Betterton, 87 Tex. 440; 29 S. W. 467; Reichenbach vs. Sage, 12 Wash. 364; 43 Pac. 354; Malone vs. Philadelphia, 147 Pa. 416; 23 Atl. 628; Wolf vs. Des Moines & Ft. Dodge Ry. Co., 64 Iowa 380; 20 N. W. 481; Hennesey vs. Metzger, 152 Ill. 505; 38 N. E. 1058; Weiss vs. U. S. F. & G. Co., 300 Ill. 11; 123 N. E. 749.

Nilson vs. Jonesboro, 57 Ark. 168; 20 S. W. 1093. Where the sum named is greatly disproportionate to the probable loss from a breach, it has been held that on this account, the penalty will not be considered as an agreement to pay liquidated damages.

Clements vs. Schuylkill R. R. Co., 132 Pa. 445; 19 Atl. 276; Cochran vs. People's Ry. Co., 113 Mo. 359; 21 S. W. 6; Colwell vs. Lawrence, 38 N. Y. 74. Miller, J.: "It is scarcely to be supposed, that the parties intended to fix an amount so extravagant, and which would be, if allowed as

The penalty of a bond cannot be enlarged by a contemporaneous agreement, and will be limited in any event, to the sum named in the instrument.¹⁰²

§136. Same subject — Where the penalty or forfeiture is imposed by statute.

There is an important distinction between bonds intended as an indemnity between private persons, and those transactions in which a bond is given in pursuance of a Statute as indemnity against a violation of a Statute or some policy of the law.

In the first case, a breach of the bond involves a violation of a private right, for which compensation in damages can be made; but when the State is the beneficiary, and the condition of the bond is for a due compliance with the law of the State, damages for the breach cannot be ascertained, and if there is to be any recovery, it must be upon the theory that the sum named in the bond is presumed to be liquidated damages.

Where an individual or corporation is granted a franchise or privilege by the Government in pursuance of a Statute which requires the giving of a bond as a condition of the grant, and to insure the performance of the terms of the grant in a certain way or within a certain time, the penalty of the bond must be considered as a forfeiture inflicted by the sovereign power for a breach of its laws, and the Government not required to prove damages as a basis of recovery.

claimed, so grossly disproportionate to the actual damages, as liquidated damages for so trivial an omission or delay, and I cannot discover any such sufficient and satisfactory reason for any inference or conclusion. Nor is any such intention to be presumed, upon the hypothesis that the damages resulting from a breach of this contract would be of such an uncertain amount as to be incapable

of proof, and that it would be difficult to show the nature of the injury caused, and the actual damages arising from the delay.

Contra—Wilcus vs. Kling, 87 Ill. 107; Brennan vs. Clark, 29 Neb. 385; 45 N. W. 472.

¹⁰² Oregon Ry. & Nav. Co. vs. Swinburne, 22 Ore. 574; 30 Pac. 322.

Thus where the State of Rhode Island by Statute granted to a foreign Corporation the right to exercise the privileges and powers of a Common Carrier within the State, upon the condition that the Railroad would be completed within a certain time, and required a bond to secure the performance of the condition. It was held that the penalty named in the bond was liquidated, and upon a breach, the whole amount would be forfeited to the State, without any proof of actual loss or damage to the State.

The Court said: "We are satisfied that the proper solution of the question now under examination is to be found in two principal considerations. The first of these is, that it was not intended by the parties, that the obligation given and accepted should be for an indemnity against any loss or damages expected to be suffered by the State, in the event that the railroad company should fail to build the railroad as required. It is found as a fact that no such loss or damage has in fact ensued.

It is equally plain that none could possibly have arisen. .

. . . As to the State itself, the real party to the arrangement and contract, it could gain nothing in its political and sovereign character by the construction of the road, it could lose nothing by the default.

If it could be supposed as possible that the State had in view the public interests of commerce and trade in the construction of the proposed railroad, and meant to provide for loss and damages to them by reason of its failure, the obvious answer is that no computation and assessment of actual damages on that account would be practicable, leaving as an alternative that the State, in fixing the penalty of the bond in the Statute, had established its own measure of the public loss. The question of damages and compensation was not, because it could not have been, in contemplation of the parties. . . .

The conclusion, in our opinion, can not be resisted that the intention of the parties in the transaction was that, if the railroad should not be built within the time limited, the Corporation should pay the State, absolutely and for its own use, the sum named in the bond."¹⁰³

¹⁰³ Mr. Justice Mathews, in *Clark vs. Barnard*, 108 U. S. 436, 459; 2 S. Ct. 878.

§137. Interest as an element in the measure of damages.

A surety upon a bond is liable for interest upon the damages ascertained from the date of the demand.¹⁰⁴ If no demand is made, interest may be recovered from the date of service upon the surety in the action upon the bond.¹⁰⁵

Interest may be recovered as damages even though the interest raises the amount recovered beyond the sum named as penalty in the bond.¹⁰⁶

Where the condition of the bond is for the performance of an act and not the payment of money, the recovery thereon is limited to the amount of the penalty and interest thereon will run only from the date of entry of the judgment.^{106a}

§138. Bonds to induce violation of law are void.

Where the motive and purpose of the bond is to induce a violation of the law, the transaction is void. This result follows, whether the bond is to secure the performance of a con-

See also *Indianola vs. Gulf, W. T. & P. Ry.*, 56 Tex. 594. Where a bond was executed to a city in the sum of \$50,000, conditioned upon the construction of a railroad by a certain time, in consideration of a grant by the city of a right of way through its streets, it was held that recovery could be had of the entire amount of the bond as liquidated damages. Since the city was not able to make proof of any actual damages, such construction must be given as will make the instrument operative.

But see *City of Aberdeen vs. Honey*, 8 Wash. 251; 35 Pac. 1097.

¹⁰⁴ *Frink vs. Southern Express Co.*, 82 Ga. 33; 8 S. E. 862; *United States vs. Poulson*, 30 Fed. Rep. 231; *Brighton Bank vs. Smith*, 94 Mass. 243; *Brainard vs. Jones*, 18 N. Y. 35; *Ellyson vs. Lord*, 124 Iowa 125; 99 N. W. 582; *Whereatt vs. Ellis*, 103 Wis. 348; 79 N. W. 416; *American Surety Co. vs. Pacific Surety Co.*, 81 Conn. 252; 70 Atl. 584.

It has been held that where a sum is named in an agreement as liquidated damages for the breach of the contract, that interest is not recov-

erable. *Hoagland vs. Segur*, 38 N. J. L. 230.

See also *United States vs. Broadhead*, 127 U. S. 212; 8 S. Ct. 1191.

¹⁰⁵ *Curtis vs. United States*, 100 U. S. 119; *United States vs. Poulson*, 30 Fed. Rep. 231; *Frink vs. Southern Express Co.*, 82 Ga. 33; 8 S. E. 862.

¹⁰⁶ *Beers vs. Shannon*, 72 N. Y. 292; *Burchfield vs. Haffey*, 34 Kan. 42; 7 Pac. 548; *Tyson vs. Sander-son*, 45 Ala. 364; *Carter vs. Thorn*, 18 B. Mon. (Ky.) 613; *Natchitoches vs. Redmond*, 28 La. Ann. 274; *Spokane & I. Lumber Co. vs. Loy*, 21 Wash. 501; 58 Pac. 672; 60 Pac. 1119; *Standard Oil Co. vs. Holmes*, 82 Ill. App. 476.

Affirmed, *Holmes vs. Standard Oil Co.*, 183 Ill. 70; 55 N. E. 647; *Pennell vs. Card*, 96 Me. 392; 52 Atl. 801; *Ellyson vs. Lord*, 124 Iowa 125; 99 N. W. 582.

Contra—*New Home Sewing Machine Co. vs. Seago*, 128 N. C. 158; 38 S. E. 805; *People's Savings Bank vs. Campau*, 124 Mich. 106; 82 N. W. 803; *Board of Education vs. National Surety Co.*, 183 Mo. 166; 82 S. W. 70.

^{106a} *Sachs vs. American Surety Co.*, 72 App. Div. 60 (N. Y.).

tract which is prohibited by law, or a contract which is void by reason of an illegal or immoral consideration.^{106b}

Thus a bond given to secure a sum agreed to be paid upon the consideration that the obligee would compound a felony, is void.¹⁰⁷

Also where the bond is given to secure purchases made for the use of a State in armed rebellion against the Government,¹⁰⁸ or for the purpose of rendering aid to the enemy in time of war in hiring soldiers to join the army of the enemy.¹⁰⁹

Bonds given to promote immoral acts¹¹⁰ or fraudulent practices¹¹¹ or in restraint of marriage,¹¹² or in restraint of trade,¹¹³ are void.

^{106b} Estate of Ramsey vs. Whitbeck, 183 Ill. 550; 56 N. E. 322.

¹⁰⁷ Cheltenham Fire Brick Co. vs. Cook, 44 Mo. 29; Vanover vs. Thompson, 49 N. C. 485; Buffalo Press Club vs. Greene, 86 Hun 20; 33 N. Y. S. 286.

¹⁰⁸ Logan vs. Plummer, 70 N. C. 388.

¹⁰⁹ Steele vs. Holt, 75 N. C. 188.

¹¹⁰ Gray vs. Mathias, 5 Ves. Jr. 286; Walker vs. Gregory, 36 Ala. 180; Weinbrinner vs. Weisiber, 3 T. B. Mon. (Ky.) 35.

¹¹¹ Tuxbury vs. Miller, 19 Johns. 311. Where the obligor agreed to pay a sum of money if the obligee would refrain from opposing the discharge of the former in bankruptcy, the obligee being a representative of creditors interested in opposing the charge.

See also Goodwin vs. Blake, 3 T. B. Mon. (Ky.) 106.

Eaton vs. Littlefield, 147 Mass. 122; 16 N. E. 771. In this case the obligee was a creditor of an insolvent. The bond was conditioned to secure a certain per cent. of the plaintiff's claim, in consideration that the plaintiff would vote for a certain person as assignee in insolvency, held to be a fraud upon other creditors and to avoid the bond.

¹¹² Woodhouse vs. Shepley, 2 Atk. 536.

Lowe vs. Peers, 4 Bur. 2225. The covenant in this bond recites: "I do hereby promise Mrs. Catherine Lowe, that I will not marry with any person beside herself; if I do, I agree to pay to said Catherine Lowe £1,000 within three months next after I shall marry anybody else."

Lord Mansfield: "This is only a restraint upon him against marrying any one else, besides the plaintiff; not a reciprocal engagement 'to marry each other.'"

As to illegality of contracts in restraint of marriage see Chalfant vs. Payton, 91 Ind. 202.

¹¹³ Wiley vs. Baumgardner, 97 Ind. 66; Alger vs. Thacher, 19 Pick. 51.

Homer vs. Ashford, 3 Bing. 326. *Best, J.*: "The law will not permit any one to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry or his capital, in any useful undertaking in the kingdom, would be void."

It is held that where a Corporation does business in a State contrary to the Statutes, all its acts are illegal, and that if officers and agents of such corporation execute bonds to secure the faithful performance of the business intrusted to them, the Sureties are not liable, inasmuch as the performance of the duties of their employment is illegal.¹¹⁴

In general all undertakings for indemnity against the consequence of doing an illegal act are void.¹¹⁵

¹¹⁴ Bank of Newberry vs. Stegall, 41 Miss. 142; Daniels vs. Barney, 22 Ind. 207.

Thorne vs. Travellers' Ins. Co., 80 Pa. 15. "There can be no doubt of the constitutional power of the legislature to prescribe the conditions under which a foreign corporation shall transact business in this state, and the manner in which its agents shall be qualified, before entering upon their duties. It has often been held that an action founded on a transaction prohibited by statute cannot be maintained, although a penalty be imposed for violating the law, and it be not expressly declared that the contract be void. Mitchell vs. Smith, 1 Binn. 118; Seidenbender et al. vs. Charles' Adm., 4 S. & R. 151; Holt vs. Green, 23 P. F. Smith 198. In this last case it was said, the objection may often sound very ill in the mouth of a defendant, but it is not for his sake the objection is allowed, it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is that no court will lend its aid to a party who grounds his action upon

an immoral or upon an illegal act. It is claimed, however, that conceding the rule that an illegal contract will not be enforced by a court, yet when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or the thing which was the price of it may be a legal consideration between the parties for a promise express or implied; and the court will not unravel the transaction to discover its origin. We may concede this view of the law to be correct, as an abstract proposition; yet it by no means controls this case. This is not an action against Thorne alone, for money had and received. It is against him and his sureties jointly on their bond, for his alleged breach of duty as a duly appointed agent of the corporation."

¹¹⁵ James vs. Hendree, 34 Ala. 488.

Lea vs. Collins, 36 Tenn. 393. In this case the obligor promised indemnity against the publication of a libel.

But see Jewett Pub. Co. vs. Butler, 159 Mass. 517; 34 N. E. 1087.

A bond of indemnity to induce a breach of trust is void. Moss vs. Cohen, 36 N. Y. S. 265.

A recovery on the bond of an employee, the fruits of which employment involve a violation of law, will not be allowed. Boylston Bottling Co. vs. O'Neill, 231 Mass. 498; 121 N. E. 411; 2 A. L. R. 902, note.

§139. Bonds to prevent performance of public duty or to induce acts in violation of public duty are void.

A bond given to induce a public officer to refrain from doing that which the law requires him to do, or to induce him to act in violation of his duty, is void, as against public policy.

Thus where a Sheriff having received, by virtue of his office, a writ of restitution, is induced by another, and in consideration of a bond of indemnity, to refuse to execute the process. The sureties upon the bond of indemnity are not liable to the Sheriff for loss sustained by him in consequence of his act.¹¹⁶

A bond to protect an officer from the consequences of disobeying the process of the Court, cannot be upheld upon the theory that the officer declines to act in good faith, or because of some uncertainty as to his rights.

If an officer holding a writ of restitution is uncertain whether the person in possession is the one named in the writ, or having a writ of execution or attachment is uncertain whether the property pointed out belongs to the debtor, he may usually, without peril, withhold service upon the process until indemnified by the party in interest. But a bond of indemnity to an officer as an inducement to refrain from action, presupposes that the officer would otherwise have obeyed the writ, and that he was not uncertain as to his duty.

A bond to a Public Officer as an inducement to perform an act within the scope of his authority, is valid, providing the question whether the act is lawful or unlawful depends upon facts which he has no means of ascertaining, and where he acts in good faith.

If an officer holds a writ of execution or attachment, his duty requires him to levy upon the property of the debtor, and it is unlawful for him to levy upon the property of a third

¹¹⁶ Harrington's Administrator vs. Crawford, 61 Mo. App. 221.

See also Blackett vs. Crissop, 1 Lord Raym. 278; Cass Co. vs. Beck, 76 Iowa 487; 41 N. W. 200; Carroll vs. Partridge, 12 Mo. App. 583; State

ex rel. vs. Harrington, 41 Mo. App. 439; Hardesty vs. Price, 3 Col. 556; Buffendeau vs. Brooks, 28 Cal. 641; Griffin vs. Hasty, 94 N. C. 438; Morgan vs. Hale, 12 W. Va. 713.

person. Yet the officer cannot be placed in such a position as to require him to determine in advance, and without proof, the conflicting claims of ownership in the property.

If when placed in such situation, he accepts a bond of indemnity in good faith, the bond will be held. It is not against public policy to submit in this way a controverted question to judicial determination.¹¹⁷ But if he executes the writ with knowledge that he is committing a trespass, the bond is void.¹¹⁸

If a trespass or other unlawful act of the officer is a past transaction, the bond of indemnity against the consequences of such act will be valid, as in such a case the bond is not the inducement to the trespass.

Thus a Sheriff levied upon and sold merchandise claimed by a third party, and subsequently refused to pay over the proceeds to the execution creditor unless indemnified, the bond was held to be valid.¹¹⁹

§140. Discharge of surety upon a bond by payment or acts equivalent to payment.

A surety upon a bond is exonerated by any act or agreement between the principal and obligee which operates as payment of the penalty described in the undertaking, and the debt being once satisfied can not be revived against the surety, except in those transactions heretofore considered in which the medium of payment, or the security substituted is void.¹²⁰

It is held that where a principal borrows money with which to pay a judgment creditor, and the latter on receipt of the money, at the request of the debtor, transfers the judgment to the person from whom the principal borrows, that the sureties upon the supersedeas bond are discharged. The judgment

¹¹⁷ Wolfe vs. McClure, 79 Ill. 564; Miller vs. Rhoades, 20 O. S. 494; Mays vs. Joseph, 34 O. S. 22; Stark vs. Raney, 18 Cal. 622; Forni-quet vs. Tegarden, 24 Miss. 96; Mc- Cartney vs. Shepard, 21 Mo. 573; Foster vs. Clark, 19 Pick. 329.

¹¹⁸ Morgan vs. Hale, 12 W. Va.

713; Collier vs. Windham, 27 Ala. 291.

¹¹⁹ Westervelt vs. Frost, 1 Abb. Pr. (N. Y.) 74.

See also Griffiths vs. Hardenbergh, 41 N. Y. 464.

¹²⁰ Ante Sec. 97.

creditor by dealing direct with the third party, might confer upon him, by assignment, title to the security; but payment being made by the hand of the debtor, is a technical satisfaction of the judgment.¹²¹

Where a debt secured by bond has been paid by an application of funds in the hands of the obligee, the parties can not thereafter by agreement apply the payment to some other debt, and revive the obligation under the bond.¹²²

Where the principal at the maturity of the debt executes his note to the obligee, it will not release the bond, unless accepted as payment.¹²³

Where it is shown that the obligee agreed to accept the notes of the principal in payment, the surety will be released whether the notes are paid or not.¹²⁴

A bond given to secure a note held by a creditor, will be valid as security for a renewal of the note. In such case the bond secures the debt, and the satisfaction of the note by renewal is not deemed a payment.¹²⁵

The possession of a bond by a surety raises a presumption of payment.¹²⁶

§141. Statutes of limitations as a defense to sureties upon a bond.

The Statutes of various States provide for a period of limitation upon the right to bring an action upon a bond.

The usual form of the Statute is that the action must be brought within the limitation after the "cause of action accrues."¹²⁷

¹²¹ Burnet vs. Courts, 5 Har. & John. (Md.) 78.

¹²² Gibson vs. Rix, 32 Vt. 824; Woodman vs. Mooring, 3 Dev. Law (N. C.) 237.

¹²³ Shumway vs. Reed, 34 Me. 560; Price vs. Barnes, 7 Ind. App. 1.

¹²⁴ Smith vs. Jackson, 97 Iowa 112; 66 N. W. 80; Morris Canal & Banking Co. vs. Van Vorst, 21 N. J. L. 100.

¹²⁵ Shrewsbury Savings Institution's Appeal, 94 Pa. 309.

¹²⁶ Carroll vs. Bowie, 7 Gill (Md.) 34.

¹²⁷ The Statute in New Jersey reads: "No action shall be brought upon any bond given to the President, Directors and company of any Bank, or to any Corporation, by any officer of such bank or corporation, with conditions for his good behavior,

The Statutes do not undertake to define when the cause of action accrues, and judicial construction of this important element of the right to invoke the Statute, has not been uniform in this country.

For the most part it is assumed that the limitation commences to run from the date the obligor is liable to a suit, but subject to the modification that the law will not permit the Statute to be used to protect fraud.

Where the principal violates his trust by defalcations, he and his surety are liable to an action from and after the date of the defalcation, and within the meaning of the Statute, the cause of action then "accrues." It, however, often occurs that the obligee has no knowledge of the default at the time it occurs, and in those cases where the principal fraudulently conceals the cause of action for a period beyond the limitation of the Statute, three questions have arisen, relating to the defense which the Statute affords.

(a) Will the fraudulent concealment of the default by the principal, prevent the operation of the Statute as against the principal himself?

(b) Will the surety who has been guilty of fraudulent concealment be discharged by the Statute, even though the principal is held?

(c) To what extent is diligence required of the obligee in discovering default?

It has been urged that since the Statute in plain terms fixes the time within which action shall be brought, and without qualification dates the limitation from the time the cause of action accrues, that it is not within the province of the Courts to repeal the Statute by an equitable construction in those cases where the diligence in concealing fraud, is greater than the diligence of those interested in its discovery.¹²⁸

or for the faithful discharge of the duties of his station, or touching the execution of his office, against either principal or sureties, after the expiration of two years from the accruing of the cause of action."

In Ohio within fifteen years "*after the cause of action accrues.*"

¹²⁸ Troup vs. Smith's Executors, 20 Johns. 33, *Spencer, C. J.*: "The inquiry is, when did the plaintiff's cause of action accrue? Most cer-

The contrary view, and the one which receives the support of the weight of authority, is that the Statutes of Limitation must be expounded reasonably, so as to suppress and not *augment* the evils they are intended to cure. That the purpose of Statutes of Limitation is to suppress fraud by preventing the assertion of claims after such lapse of time that the truth can not be well ascertained; that the Statute should not be so construed as to encourage fraud and deceit, so that under the plea of the Statute, the party can take advantage of his own wrong doing.¹²⁹

The further question arises whether the surety will be deprived of the literal application of the Statutes in his behalf on account of the fraudulent concealment of the principal, to which he was not a party.

tainly when the fraud was consummated. . . . The fact that the plaintiff did not 'discover the imposition practised upon him, is entirely distinct from the existence of such fraud and imposition. If, then, the plaintiff's cause of action accrued upon the consummation of the fraud by the testator, and not at the time plaintiff discovered it, the Statute interposes as a protection, unless the action has been commenced and sued within six years next after the cause of action accrued.

"But it is asserted that fraud committed under such circumstances as to conceal the knowledge of a fact, and thus preventing a plaintiff from asserting his rights within the limited period, may be replied, and is an answer to the plea of the Statute of Limitations, if the action or suit be brought within six years after the discovery of the fraud. . . . But Courts of Law are expressly bound by the Statute; it relates to specified actions; and it declares that such actions shall be com-

menced and sued within six years next after the cause of such action accrued, and not after; thus, not only affirmatively declaring within what time these actions are to be brought, but inhibiting their being brought after that period. I know of no dispensing power which courts of law possess, arising from any cause whatever."

¹²⁹ Bree vs. Holbech, 2 Doug. 655; Reynolds vs. Hennessy, 17 R. I. 169; 20 Atl. 307; 23 Atl. 639.

First Mass. Turnpike Co. vs. Field, 3 Mass. 201, *Parsons, C. J.*: "The delay of bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain the knowledge that he had a cause of action. If this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law, if we permitted the defendant to avail himself of his own fraud." Bradford vs. McCormick, 71 Iowa 129; 32 N. W. 93.

While the principal who is seeking to use the Statutes to cover a fraudulent act may properly be denied the protection of the Statutes, the surety who is innocent of fraud must be held, if at all, upon the theory that the contract of suretyship makes his liability co-extensive with the principal, without regard to the particular reasons whereby the liability of the principal is established.

A surety is bound by the fraudulent conduct of his principal, and although without fraud on his own part, he must answer under his contract for such default of his principal, which is not barred by the Statute.¹³⁰

The obligee in the bond does not owe a duty to the surety of watching the affairs of the principal for the purpose of setting in operation the Statute of Limitations against himself.

The obligee owes a duty of good faith; he cannot conceal that which he knows from the surety, nor be blind to facts which from his position he is bound to know, but he is not chargeable with negligence in failing to make investigations, the result of which would be material for the surety to know.¹³¹

The cause of action upon a bond of indemnity to "save harmless from damages" does not arise until the obligee has suffered some damages. The undertaking is not to acquit the obligee from all *liability* for damages, but is intended to merely indemnify against actual damages, and the Statute of Limitations will begin to run only when the obligee has paid the damages.¹³²

¹³⁰ Sparks vs. Farmers' Bank, 3 Del. Ch. 275.

¹³¹ Graves vs. Lebanon National Bank, 10 Bush (Ky.) 28. "The directors may have been negligent in the discharge of their duties, and this negligence may have enabled M. for the time to misappropriate the funds of the bank, and to conceal its true condition by false reports made to the comptroller of the currency and by false entries upon the books of the association. But this negligence cannot avail

the sureties who covenanted that their principal should 'well and truly perform the duties' of his position. . . . Their covenant is unconditional, and no failure of duty upon the part of the directors of the association, short of actual fraud or bad faith, can be deemed sufficient to exonerate them from its performance." Wayne vs. Commercial Nat. Bank, 52 Pa. 343.

¹³² Campbell vs. Rotering, 42 Minn. 115; 43 N. W. 795.

§142. As to who are proper parties in an action upon a bond.

Where an instrument is under seal no person can sue or be sued upon its covenants except those who are named as parties therein.¹³³

And so a bond under seal, in which the obligees are described as "agents," without disclosing for whom the parties are so acting, cannot be enforced by the principal.¹³⁴

If the bond is not under seal, such as those instruments originating in States where private seals have been abolished, or where the distinction between sealed and unsealed instruments has been removed by Statute, the person having a beneficial interest in the bond, may maintain an action upon it, although not a party to the instrument.

¹³³ *Beckham vs. Drake*, 9 M. & W. 79; *Townsend vs. Hubbard*, 4 Hill (N. Y.) 351; *Briggs vs. Partridge*, 64 N. Y. 357.

Even though the instrument on its face reads that the party signing and sealing is an agent, it cannot be enforced by the principal. *Kiersted vs. Orange & Alexandria R. R. Co.*, 69 N. Y. 343; *Schaefer vs. Henkel*, 75 N. Y. 378; *Huntington vs. Knox*, 7 Cush. 374; *Andrews vs. Estes*, 11 Me. 267.

Follansbee vs. Johnson, 28 Minn. 311; 9 N. W. 882. The distinction in this respect, between contracts under seal and simple contracts, has since been abandoned by the Minnesota Court as being merely technical and without merit. *Jefferson vs. Asch*, 53 Minn. 446; 55 N. W. 604.

Miller vs. Kingsbury, 28 Ill. App. 532; *Moore vs. House*, 64 Ill. 162.

A Statute in Illinois now declares that contracts under seal may be sued upon as if unsealed. *Harms vs. McCormick*, 30 Ill. App. 125; *Dean vs. Walker*, 107 Ill. 540.

See also *McDowell vs. Laev*, 35

Wis. 171; *Houghton vs. Milburn*, 54 Wis. 554; 12 N. W. 23. Wherein no distinction is made between sealed and unsealed instruments in respect to the enforcement for the benefit of third parties. The preponderance of authority, however, maintains the view stated in the text.

Willard vs. Wood, 135 U. S. 309; 10 S. Ct. 831; *Pettee vs. Peppard*, 120 Mass. 522; *Robbins vs. Ayres*, 10 Mo. 539; *Crowell vs. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Fairchild vs. North Eastern Mut. Life Assn.*, 51 Vt. 613.

¹³⁴ *Henricus vs. Englert*, 137 N. Y. 488; 33 N. E. 550.

See also *Packard vs. Brewster*, 59 Me. 405; *Farmington vs. Hobart*, 74 Me. 416.

But see *Emmitt vs. Brophy*, 42 O. S. 82. Where it was considered immaterial whether the bond was under seal or not, and that in either event a third person, though not named in the instrument, might maintain the action in his own name.

The rule is, however, subject to the qualification that there must be an intention of benefiting the third party, to whom the promisee is under a legal obligation to do that which is called for in the bond.¹³⁵

A number of the States have code provisions, enabling the real party in interest to maintain an action upon the bond in his own name, although not named as a party in the instrument.¹³⁶

In England, the doctrine that a party for whose benefit a contract is made may enforce it in his own name, does not prevail,¹³⁷ except where the obligor is shown to have received money for the use of the third party, in which case, the latter may sue for it.¹³⁸

If a bond runs to one in a representative capacity, such as Administrator or Guardian, it is held that the obligee may bring the action in his individual capacity.¹³⁹ Or an action may be brought by an officer in his official capacity.¹⁴⁰ If the obligee is deceased, his administrator may sue on the bond.¹⁴¹

¹³⁵ *Jefferson vs. Asch*, 53 Minn. 446; 55 N. W. 604; *Carnahan vs. Tousey*, 93 Ind. 561; *Leake vs. Ball*, 116 Ind. 214; 17 N. E. 918; *Plano Mfg. Co. vs. Burrows*, 40 Kan. 361; 19 Pac. 809; *Mumper vs. Kelley*, 43 Kan. 256; 23 Pac. 558; *N. Y. Life Ins. Co. vs. Hamlin*, 100 Wis. 17; 75 N. W. 421.

As to bonds given to secure building contracts, with covenants to pay labor and material claims, see *Ante* Sec. 131.

¹³⁶ *Alabama Civil Code*, Sec. 28: "Actions on promissory notes, bonds, or other contracts, express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not." In California, the Civil Code

provides (Sec. 1559), that "a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

¹³⁷ *Tweddle vs. Atkinson*, 1 Best. & Sm. 393; *Price vs. Easton*, 4 Barn. & Ad. 433; *Gandy vs. Gandy*, L. R., 30 Ch. Div. 57; *In re Rotherham Alum & Chem. Co.*, L. R., 25 Ch. Div. 103.

¹³⁸ *Lilly vs. Hays*, 5 Ad. & Ell. 548.

¹³⁹ *Waddell vs. Moore*, 24 N. C. 261; *Ayres vs. Toland*, 7 Har. & John, (Md.) 3.

¹⁴⁰ *Chancellor vs. Hoxsey*, 41 N. J. L. 217.

¹⁴¹ *Young, Admr., vs. Patterson*, 165 Pa. 423; 30 Atl. 1011.

§143. Joinder of parties plaintiff.

All persons for whose benefit a contract is made must join in an action for the breach of it.

A bond running to two or more obligees, does not constitute a contract with one of them separately, and except when one or more of the obligees refuses to join in the action, or for other good reason, such as in some jurisdictions, the death of one joint obligee, no action can be maintained unless all are made plaintiffs.¹⁴²

But where a bond is made payable to a principal or a designated agent, either may bring suit upon it.^{142a}

Where several obligees are joined in one bond, but to secure distinct and separate rights, their remedy is by separate action.

Thus a principal, representing four Insurance Companies, executed a bond in which they were all named as obligees, conditioned that the principal would faithfully perform his duties as agent toward each Company respectively. It was considered that the general covenant was made with each Company separately, and that a joint action could not be maintained.¹⁴³

Also where distinct obligations are assumed toward one joint obligee which did not run to the other, each obligee can have a separate action for the breach which affects his especial right.¹⁴⁴

Even though the conditions of the bond may require a different relief on the part of the several obligees, the transaction may nevertheless be joint.¹⁴⁵

¹⁴² Bradburne vs. Botfield, 14 M. & W. 559; Phillips vs. Poole, 96 Ga. 515; 23 S. E. 504; Burns vs. Follansbee, 20 Ill. App. 41; Sims vs. Harris, 47 Ky. 55; Wallis vs. Dilly, 7 Md. 237; Dana Executor vs. Parker, 27 Fed. Rep. 263; Phillips vs. Singer Mfg. Co., 88 Ill. 305; Norma vs. Conlan, 68 N. J. L. 88; 52 Atl. 210; International Hotel Co. vs. Flynn, 238 Ill. 637; 87 N. E. 855; 15 Ann. Cas. 1062; Baker vs. Peterson, 300 Ill. 526; 133 N. E. 214.

In an action of debt on an executor's bond, a person who is a party to the bond is a necessary party plaintiff, although he has no interest in the property. Stevens vs. Partridge, 88 Ill. App. 665.

In Massachusetts, where one of several joint obligees is deceased, the survivor may maintain a separate action on the bond. Donnell vs. Manson, 108 Mass. 576.

^{142a} Files vs. Reynolds, 66 Ark. 314; 50 S. W. 509.

¹⁴³ Germania Fire Ins. Co. vs. Hawks, 55 Ga. 674.

See also Hees vs. Nellis, 65 Barb. 440.

¹⁴⁴ Sprague vs. Wells, 47 Minn. 504; 50 N. W. 535; White vs. Bowman, 78 Tenn. 55; Renkert vs. Elliott, 79 Tenn. 235.

But see McMahon vs. Webb, 52 Miss. 424.

¹⁴⁵ Lillard vs. Lillard, 44 Ky. 340; Haughton vs. Bayley, 31 N. C. 337.

§144. Joinder of parties defendant.

If a bond is joint or several, any one or more of the obligors may be joined as defendants in the same action.¹⁴⁶

In Massachusetts and Illinois it is held that the plaintiff may bring his action against one or all of the obligors jointly and severally liable but not against an intermediate number.¹⁴⁷

Where the obligors are severally liable they cannot be joined in one action,¹⁴⁸ except where the code so provides.¹⁴⁹ For the most part the codes of the States authorize such joinder of parties as will give effectual relief without requiring a multiplicity of actions, as where one of two joint obligors is deceased, the survivor may generally be sued jointly with the Administrator of the deceased obligor, although one is charged *de bonis propriis* and the other *de bonis testatoris*.¹⁵⁰

Where successive bonds are given to secure the same liability, all the sureties upon the several bonds may be joined in one action, if there is a common liability.¹⁵¹

Where the bond of an employee recites that the surety will reimburse the obligee for loss sustained by the defalcation of

¹⁴⁶ State vs. Bennett, 24 Ind. 383; McKee vs. Griffin, 60 Ala. 427; Poulain vs. Brown, 80 Ga. 27; 6 S. E. 107; Fidelity & Deposit Co. vs. Aultman, 58 Fla. 228; 50 So. 991.

¹⁴⁷ Leonard vs. Speidel, 104 Mass. 359; Gottfried Brewing Co. vs. McDonald, 146 Ill. App. 601. But upon official bonds, Ch. 103, Sec. 13, Illinois Statutes, authorizes suits against any one or all of the obligors.

¹⁴⁸ State vs. Powers, 52 Miss. 198.

¹⁴⁹ The Ohio Code provides: "One or more of the persons severally liable on an instrument may be included in the same action thereon." Sec. 5009.

¹⁵⁰ Lawrence vs. Doolan, 68 Cal. 309; 5 Pac. 484; 9 Pac. 159; Green vs. Conrad, 114 Mo. 651; 21 S. W. 839.

Contra—Metz vs. The People, 6 Col. App. 57; 40 Pac. 51; State vs. Banks, 48 Md. 513.

¹⁵¹ Singer Mfg. Co. vs. Ponder,

82 Tex. 653; 18 S. W. 152, *Hobby, J.*: "As the record stands, the sureties on the bond executed in September, 1884, are liable, unless the second bond was executed as a substitute for and in lieu of the first bond; and the sureties on the bond executed in November, 1886, are also liable, unless the defalcation or shortage of Ponder occurred prior to the date of their bond. Neither of these facts appear. But on the contrary, it is distinctly stated that the second bond was executed as 'additional security,' and it does appear that the shortage or defalcation transpired subsequent to the execution of the second bond. These conditions present a case of a common liability on the part of all of the sureties relating to the same subject matter, and where the right of

the employee, also that the employee will indemnify the surety, against loss on the bond, such instrument is not the joint obligation of the principal and surety, and the obligee can maintain an action only against the surety.¹⁵²

In a state where principal and surety are in law joint and several contractors and obligors, the surety's obligation is not that of an indemnitor, or of a collateral guarantor, against whom no action can be brought without demand or notice, or until after failure to collect from the principal. The obligation is an absolute and unconditional one, binding both principal and surety for the full performance of each and every term, condition, and requirement of the contract. A joint or a separate action might at common law and under the statute be brought thereon.¹⁵³

Sometimes it happens in the case of a joint and several bond executed by two or more sureties, the principal's obligation is for the full penalty and the sureties' obligations are limited to separate parts thereof. It is settled law that a single action against the principal and all the sureties may be maintained on such an obligation, and that separate judgments may be rendered against the several defendants properly limited to the amount for which each surety may have separately bound himself.¹⁵⁴

recovery existed as against all of them, because the contract entered into by all of the sureties was for the same purpose, and had reference to the same matter, but was merely entered into at different times.

"Under the averments of the petition the suit could have been maintained separately against the sureties on these bonds for the same defalcation, and if so, no reason is perceived why, upon the principle of avoiding many suits, this could not be maintained."

Powell vs. Powell, 48 Cal. 235.

¹⁵² American Bonding & Trust Co. vs. Milwaukee Harvester Co., 91 Md. 733; 48 Atl. 72.

¹⁵³ Neil vs. Board of Trustees, 31 O. S. 15; Saint vs. Wheeler & Wilson Mfg. Co., 95 Ala. 362; 10 So. 539; 36 Am. St. Rep. 210; Walsh Const. Co. vs. City of Cleveland, 250 Fed. 137.

¹⁵⁴ Heppe vs. Johnson, 73 Cal. 265; 14 Pac. 833; Briggs vs. McDonald, 166 Mass. 37; 43 N. E. 1003; Walsh Const. Co. vs. City of Cleveland, 250 Fed. 137.

CHAPTER VI.

OFFICIAL BONDS

- Sec. 145. Who are Public Officers.
- Sec. 146. The Duty of a Public Officer to Give a Bond Arises from Statute.
- Sec. 147. Bonds of Deputies.
- Sec. 148. Qualification and Approval of Sureties.
- Sec. 149. The Signing of the Bond by the Principal.
- Sec. 150. Liability of Sureties as Affected by Failure to Deliver or Furnish the Bond Within the Time Required by Law.
- Sec. 151. Sureties Upon Official Bonds Discharged by Alterations to Which They Do Not Consent.
- Sec. 152. Alteration in the Duties of the Principal by Amendment to the Law.
- Sec. 153. Extension of Tenure of Office by Legislative Act.
- Sec. 154. Special Bonds Given by Officers Who Have also Given General Bonds.
- Sec. 155. Concealment of Matters Material to the Risk.
- Sec. 156. Bonds of Public Officers not Retroactive and Cover only the Period Named in the Bond.
- Sec. 157. Same Subject—Where the Wrongful Act was Partly in One and Partly in Another Term.
- Sec. 158. Second Bond Given in the Same Term Cumulative.
- Sec. 159. Liability of Surety for the Negligence or Error in Judgment of a Public Officer.
- Sec. 160. Liability of Sureties for Failure of Public Officer to Account for the Use of Public Funds.
- Sec. 161. Sureties not Liable for Defaults of Principal in not Performing His Contracts with Persons Dealing with Him in His Official Capacity.
- Sec. 162. Sureties Upon Official Bonds are not Released by the Negligence or Misconduct of Other Officials.
- Sec. 163. Sureties not Liable for Failure to Account for Money Received by the Principal Outside the Scope of His Office.
- Sec. 164. Liability Upon Bond of Sheriff or Constable for Trespass and Other Wrongs Committed Colore Officii.
- Sec. 165. View that Sureties are not Liable for Wrongs of Sheriff or Constable Committed Colore Officii.
- Sec. 166. Liability for Loss of Public Money by Failure of the Bank Used as Public Depository.
- Sec. 167. Liability for Loss of Public Money by Theft or Robbery.
- Sec. 168. Liability Against Judicial Officers Acting Without Jurisdiction.
- Sec. 169. Liability of Judicial Officers for Ministerial Acts.

- Sec. 170. Liability of Principal for Acts of his Deputy.
- Sec. 171. Liability on Bond of a Notary Public.
- Sec. 172. Defenses in Actions Upon Bonds of Public Officers.
- Sec. 173. Presumption that Official Duty has been Performed.
- Sec. 174. Evidence Against Sureties on Official Bonds.
- Sec. 175. Same Subject—Judgment Against Principal as Evidence Against the Surety.
- Sec. 176. Same Subject—View that Judgment Against the Principal is Prima Facie Evidence Against the Surety.
- Sec. 177. Same Subject—View that Judgment Against the Principal is Conclusive Against the Surety.
- Sec. 178. Limitations Upon Actions Against Sureties on Official Bonds.

§145. Who are public officers.

A public office is a franchise conferred by the Government of the State or Municipality, either by election or appointment, carrying with it the right and duty of exercising a public function.

It differs from employment or agency in that the latter arises out of contract, in which the rights of the parties are definite and specific, and the duty and tenure of the employment are fixed. Whereas the terms of the franchise of a public office are imposed by law, sometimes by the general Statute creating the office, and sometimes by the will of other public officers to whom the law has delegated the power.^a

There are no contracting parties to an office. A person accepts a public office without any covenants express or implied between himself and the State as to the character of his duties, and without any binding stipulations as to whether the duties thus conferred by law upon his office, shall be continued as the duties of his position during the tenure of the office. The dominant features of an office are not found in contract relations.¹

^a For a distinction between a public office and public employment, see *Brown vs. Russell*, 166 Mass. 14; 43 N. E. 1005; *Throop vs. Langdon*, 40 Mich. 673; *State vs. Broome*, 61 N. J. L. 115; 38 Atl. 841; *U. S. vs. Maurice*, 2 Brock. (U. S.) 96; *Lucas vs. Futrall*, 84 Ark. 540; 106 S. W. 667; *Hart vs. Mayor of Newark*, 77 A. 1086; 80 N. J. L. 600; *Wells vs. State*, 94 N. E. 321; 175 Ind. 380; *Fredericks vs. Board of Health of Ho-*

boken, 82 A. 528; 82 N. J. L. 200.

¹ *Nichols vs. MacLean*, 101 N. Y. 528; 5 N. E. 347, *Andrews, J.*: "The right to hold an office and to receive the emoluments belonging to it does not grow out of any contract with the State, nor is an office property in the same sense that cattle or land are the property of the owner. It is, therefore, the settled doctrine that an officer acquires no vested right to have an office continued during the time for which

The Dartmouth College case² points out the vital distinction between an office and a contract, in holding that all persons having contractual relations with the Government are protected until by their own consent or by their own breach the contract is abrogated. But a person in an official relation is subject to the will of the sovereign, both as to the duties required of him, and the tenure of the office.

It does not necessarily follow that all public service rendered according to the requirements of law, to which a person is appointed under the provisions of a public Statute, constitutes such person a public officer. His relations to the State may be contractual, notwithstanding he is in public service and performing duties defined by law.

Thus where the Legislature authorized a Geological and Agricultural survey, and by the act provided for the appointment of three Commissioners, whose duties were specifically defined in the Statute, and the Governor of the State was re-

he was elected or appointed, nor to have the compensation remain unchanged. The legislature may abolish an office during the term of an incumbent, or diminish the salary or change the mode of compensation, subject only to constitutional restrictions."

See also *Beebe vs. Robinson*, 52 Ala. 66; *In re Bulger*, 45 Cal. 553; *State vs. Bell*, 116 Ind. 1; 18 N. E. 263; *Crook vs. People*, 106 Ill. 237; *Augusta vs. Sweeney*, 44 Ga. 463; *Bryan vs. Cattell*, 15 Ia. 538; *Evans vs. Populus*, 22 La. Ann. 121; *Prince vs. Skillin*, 71 Me. 361; *Hyde vs. The State*, 52 Miss. 665; *Love vs. Jersey City*, 40 N. J. L. 456; *Bunting vs. Gales*, 77 N. C. 283; *Kilgore vs. Magee*, 85 Pa. 401; *State of Iowa vs. Spaulding*, 72 N. W. 288; 102 Iowa 639; *State vs. Smith*, 145 N. C. 476; 59 S. E. 649; *State vs. Mackie*, 82 Conn. 398; 74 Atl. 759; *Richie vs. Philadelphia*, 225 Pa. 511; 74 Atl. 430.

That the franchise of a public office is not contractual is further

shown by the fact that the officer may at any time put an end to the relation by resignation, and without the consent of the sovereign. *Hoboken vs. Gear*, 27 N. J. L. 265; *United States vs. Edwards*, 1 McLean 467.

But see *Regina vs. Lane*, 2 Md. Raym. 1304; *Edwards vs. United States*, 103 U. S. 471.

In some States the constitution prohibits change of salary during term. *Foreman vs. People*, 209 Ill. 567; 71 N. E. 35.

² *Trustees of Dartmouth College vs. Woodward*, 4 Wheat. 518, 694, *Story, J.*: "It is admitted, that the State legislatures have power to enlarge, repeal and limit the authorities of public officers, in their official capacity, in all cases, where the constitutions of the States respectively do not prohibit them; and this, among others, for the very reason, that there is no express or implied contract, that they shall always, during their continuance in office, exercise such authorities; they are to exercise them only during the good pleasure of the legislature."

quired to enter into a contract with the Commissioners for six years, for the compensation named in the Statute, the relations of the Commissioners to the State were deemed contractual and not official, and a subsequent repeal of the Statute providing for the appointment was held not to affect the tenure of their employment.³

These essential distinctions between contractual and official

³ Hall vs. Wisconsin, 103 U. S. 5, *Swayne, J.*: "In a sound view of the subject it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a State, for the erection, alteration, or repair, of public buildings, or to supply the officer or employees who occupy them with fuel, light, stationery, and other things necessary for the public service. The same reasoning is applicable to the countless employees in the same way, under the national government. It would be a novel and startling doctrine to all these classes of persons that the government might discard them at pleasure, because their respective employments were public offices, and hence without protection of contract rights."

See *United States vs. Hartwell*, 6 Wall. 385. Where the questions involved a clerk in the office of the Assistant Treasurer of the United States, whose position as such clerk was provided for by Statute and the salary fixed by Congress. The majority of the Court considered that he was an officer.

Swayne, J.: "He was a public officer. The General Appropriation Act of July 23d, 1866, authorized the assistant treasurer to appoint a specified number of clerks, who

were to receive, respectively, the salaries thereby prescribed. The indictment avers the appointment of the defendant in the manner provided in the act.

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.

"The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.

"A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other." *Shelby vs. Alcorn*, 36 Miss. 289.

"And we apprehend that it may be stated as universally true, that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such charge or employment is an office."

relations furnish the basis of important differences between the contract rights of those who undertake to answer for the defaults of private and public obligations.

Sureties upon the bonds of public officers must be held to contract with reference to the special control which the sovereign reserves in granting such office.

Defenses based upon the alteration of the contract between principal and obligee, and other defenses growing out of defects in a contract relation to which the suretyship is collateral, cannot generally be interposed where the relation of the principal to the obligee is official.

An official oath is the medium by which the officer is bound to his employment, and is a distinguishing characteristic of an office.⁴

⁴ *Trainor vs. Board of Anditors*, 80 Mich. 162; 50 N. W. 809; *State of Iowa vs. Spaulding*, 102 Iowa 639; 72 N. W. 288.

McCornick vs. Thatcher, 8 Utah 294; 30 Pac. 91. The trustees of the Utah Agricultural College, whose appointment is derived from the Governor, whose duty and compensation are fixed by Statute, and who are required to take an official oath, are considered public officers.

State vs. Wilson, 29 O. S. 347.

The Constitution of Ohio provides that "no person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector." The defendant in this case was a resident and elector of Indiana, and was appointed as medical superintendent of a Hospital for the Insane. The question involved was his eligibility under the Constitution. The Court said: "Let us look at some of the indicia of his being an officer. He is appointed for a definite term. He must take the oath prescribed by the Constitution. He must reside in the institution that he superintends. His duties are prescribed by

law and not by contract. He is clothed with the right and correspondent duty to execute a public trust."

Worthy vs. Barrett, 63 N. C. 199; *Collins vs. Mayor*, 3 Hun 680. "We see no reason to doubt that the plaintiff was an officer. His duties were those pertaining to an office. He was required by ordinance to take, and did take, the official oath; and he was amenable to all the penalties of statute for neglect or violation of official duties. Probably the true test to distinguish officers from simple servants or employees, is the obligation to take the oath prescribed by law."

Lindsey vs. Attorney General, 33 Miss. 508.

The omission by the legislature to prescribe an oath of office as a condition of the franchise of an office will not change what would otherwise be an official position to non-official. Such lack of requirement for oath of office, while constituting legislative oversight and neglect, does not of itself affect the

A further indicia of public office is where the duties prescribed by the Statute are those which belong to the position irrespective of the person who performs the service.^b

A Notary Public is a public officer.^c An Attorney at Law, by reason of the public character of his service in the administration of justice, and the oath he is required to take, has been deemed a public officer.⁷

It has been said that the test of public office is that it is created by the law-making power, and is a part of the administration of government,⁸ and that the term public office includes all persons appointed or elected to discharge a public duty.⁹

§146. The duty of a public officer to give a bond arises from statute.

There is no common law requirement that a public officer shall give a bond as a condition of entering upon the duties of his office.

character and status of the employment. *State vs. Kennon*, 7 O. S. 559; *Commissioners vs. Evans*, 74 Pa. 124.

⁵ *State vs. May*, 106 Mo. 488; 17 S. W. 660.

⁶ *People vs. Rathbone*, 145 N. Y. 434; 40 N. E. 395. The question involved in this case is whether a Notary Public came within the prohibition of the Constitution of the State of New York, providing that public officers shall not use a pass upon a railway. The Court said: "The People have plainly declared in precise and unambiguous words that no public officer shall receive or make use of a pass, and within the territorial limits of the State, that command is enforceable, and it must be obeyed by every person who holds an office, which, like the one before us, is public in its relation to the body politic, by reason of the mode of its creation and of the powers conferred and functions defined by law."

State vs. Clarke, 21 Nev. 333; 31 Pac. 545. In Nevada the Constitution provides: "No person holding any lucrative office under the Government of the United States or any other power, shall be eligible to any civil office of profit under this State." And it was held that a Federal officeholder was not eligible for appointment as notary public by reason of this constitutional limitation.

Governor vs. Gordan, 15 Ala. 72.

⁷ *White's Case*, 6 Mod. 18; *Walmesley vs. Booth*, 27 Eng. Rep. Reprint 626; *In re Cooper*, 22 N. Y. 67; *Waters vs. Whittemore*, 22 Barb. 593; *Thomas vs. Steele*, 22 Wis. 207. But see *Robinson's Case*, 131 Mass. 376; *Cohen vs. Wright*, 22 Cal. 293; *Ex parte Garland*, 4 Wall. 333.

⁸ *Smith vs. Moore*, 90 Ind. 294; *State vs. Jennings*, 57 O. S. 415; 49 N. E. 404; *Guthrie Daily Leader vs. Cameron*, 3 Okl. 677; 41 Pac. 635; *Richie vs. Philadelphia*, 225 Pa. 511; 74 Atl. 430.

⁹ *Henley vs. Mayor of Lyme*, 5 Bing. 91; *Rowland vs. Mayor*, 83 N. Y. 372.

The Legislature, except where restrained by the Constitutional provisions,¹⁰ fixes by statute the terms upon which an office may be granted, and in nearly all cases has required that the officer give a bond, and either fixes the amount of the penalty, and other conditions, such as the time within which it must be given, and the number and qualifications of the sureties, or delegates to some public officer the function of determining the conditions under which a bond will be accepted.¹¹

A public officer is liable for a breach of his official duties, and such liability may be enforced even though he has not given a bond. The remedy upon his bond is cumulative, and the officer may be sued for his misconduct without joining his sureties. Statutory provisions requiring bonds have therefore furnished additional safety and protection to the people without abridging their rights under the common law.¹²

Although a bond does not conform to the requirements of the statute, if accepted and the officer enters upon the duties of his office, the undertaking will be binding.^{12a}

Thus where the statute fixes the amount of the penalty, and the bond is given for a larger sum, it will be valid at least to the amount of the required penalty.¹³ Or where the statute requires several sureties, and requires each to make himself liable for the entire penalty, and the bond is accepted with stipulation that each surety is to be liable for only a pro rata part of the penalty.¹⁴

It is not necessary that the conditions of the bond be recited in the exact language of the statute. Words which express the substance or intent of the statute will be sufficient compliance with the law.^{14a}

¹⁰ The Federal Constitution, and the Constitutions of the States, fix the tenure of office in many cases, also define the qualifications of officeholders, but do not require official bonds.

¹¹ In Ohio the county treasurer is required to give a bond in such sum as shall be fixed by the county commissioners.

¹² *Cole Co. vs. Dallmeyer*, 101 Mo. 57; 13 S. W. 687.

^{12a} *Carter vs. Fidelity & Deposit Co.*, 134 Ala. 369; 32 So. 632; *U. S. F. & G. Co. vs. Union Trust & Savings Co.*, 142 Ala. 532; 38 So. 177; *Higdon vs. Fields*, 6 Ala. App. 281; 60 So. 594.

¹³ *Graham vs. State*, 66 Ind. 386; *United States vs. Mynderse*, 11 Blatch. 1.

¹⁴ *State vs. Polk*, 14 Lea (Tenn.).

^{14a} *U. S. F. & G. Co. vs. Poetker*, 102 N. E. 372; 180 Ind. 255; *L. R. A.* 1917D, 984, and note, "Effect of insertion of unauthorized provision in a bond required by statute."

Where the statute required a Justice of the Peace to enter into a bond "conditioned that he will well and truly do and perform every ministerial act that is enjoined upon him by law" it was considered a substantial compliance to recite in the bond that the Justice "shall well and truly discharge the duties of Justice of the Peace according to law," although this language, in terms, apparently included the judicial as well as the ministerial acts of the Justice.¹⁵

The giving of a joint bond, when the statute requires it to be joint and several, was held to bind the sureties.¹⁶

Where the statute requires the bond to be executed under seal, the omission of the seal renders it a nullity as a specialty, but a public officer and his sureties cannot escape liability on such an instrument, where the officer fills the position and commits default while exercising his official duty. The emoluments and benefit derived by the officer from his franchise are sufficient consideration to support the bond as a simple contract.¹⁷

Although there is no statutory requirement for a bond, yet where a public officer voluntarily tenders a bond which is accepted, the sureties will be liable. Such contract will have all the force of an undertaking to secure a private obligation.¹⁸

¹⁵ *Place vs. Taylor*, 22 O. S. 317.

See also *People vs. Love*, 19 Cal. 676. The Statute required the bond to run to the people of the State of California, and the bond instead was executed "to the State of California."

See also *Huffman vs. Koppelkom*, 8 Neb. 344. Where the bond was given to the State, though required by Statute to run to the county.

See also *Jessup vs. United States*, 106 U. S. 147; 1 S. Ct. 74; *Sutherland vs. Carr*, 85 N. Y. 105; *Jones vs. Newman*, 36 Hun 634.

¹⁶ *Tevis vs. Randell*, 6 Cal. 632; *Perkins Co. vs. Miller*, 55 Neb. 141; 75 N. W. 577.

¹⁷ *United States vs. Linn*, 15 Peters 290.

See also *Rutland vs. Paige*, 24 Vt. 181; *Boothbay vs. Giles*, 68 Me. 160; *United States vs. Bradley*, 10 Peters 343; *Sooy vs. The State*, 38 N. J. L. 324.

¹⁸ *State vs. Harney*, 57 Miss. 863; *United States vs. Mason*, 2 Bond. 183; *Bank vs. Cresson*, 12 Serg. & R. (Pa.) 306; *United States vs. Rogers*, 28 Fed. Rep. 607; *Hoboken vs. Harrison*, 30 N. J. L. 73; *Sooy vs. The State*, 38 N. J. L. 324; *Ahsmuhs vs. Bowyer*, 39 Okla. 376; 135 Pac. 513; 50 L. R. A. (N.S.) 1060, note.

Contra—*State vs. Heisley*, 50 Ia. 404; 9 N. W. 327.

It has been held that a bond which is authorized by an unconstitutional statute is invalid.¹⁹

§147. Bonds of deputies.

A deputy is one who acts for another, and the acts of a deputy of a public officer are necessarily official, in all cases where the law authorizes the appointment of deputies.²⁰

A deputy is to be distinguished from an Assistant or employee of a public officer, although the latter may be authorized by statute, and their duties fixed by law. A clerk or employee does not perform official acts, although sometimes considered as public officers.²¹ But a deputy is a substitute for his principal, and acts by virtue of the authority inherent in his appointment, although he acts in the name of the principal²² except

¹⁹ Byers vs. State, 20 Ind. 47.

Not necessarily. Love vs. McCoy, 81 W. Va. 478; 94 S. E. 954; L. R. A. 1918C, 832, and note.

See also Coburn vs. Townsend, 103 Cal. 233; 37 Pac. 202.

²⁰ State ex rel. vs. Bus, 135 Mo. 325; 36 S. W. 636, *Macfarlane, J.*: "Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the Circuit Courts; they are required to take the oath of office, which is to be indorsed upon the appointment and filed in the office of the clerk of the Circuit Court. After appointment and qualification they 'Shall possess all the power and may perform any of the duties prescribed by law to be performed by the sheriff.' The right, authority and duty are thus created by statute; he is invested with some portions of the sovereign functions of the government to be exercised for the benefit of the public and is, consequently, a public officer within any definition given by the courts or text writers. It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by

contract. The power of appointment comes from the State, the authority is derived from the law, and the duties are exercised for the benefit of the public."

Dayton vs. Lynes, 30 Conn. 351; White vs. State, 44 Ala. 409; United States vs. Martin, 17 Fed. Rep. 150.

²¹ United States vs. Hartwell, 6 Wall. 385.

²² Anderson vs. Brown, 9 O. 161. In this case the deputy sheriff undertook to execute a sheriff's deed in his own name as deputy. Held, "where delegated authority is exercised, it must be exercised in the name of the principal. Where one acts as the attorney of another, the act should purport to be the act of the constituent. The deputies of a sheriff compose but one officer, and they have no authority except that exercised in the name of the principal. If, then, as in this case, a deputy assume to convey lands himself in his own name, his acts are void, like those of any other agent."

Glencoe vs. People, 78 Ill. 382;

where specially authorized by statute to act *Eo Nomine*.²³

Judicial officers cannot act through a deputy²⁴ but ministerial authority may generally be exercised by a deputy.

Official deputies are of two classes; where their appointment and powers are fixed by law, and who give bond to the State or people and whose compensation is paid out of the public treasury; and where their appointment, although authorized by law, is dependent upon the will of the principal, as to whether it shall be made, and whose powers and duties are such as the principal shall in his discretion delegate, and who give bond to the principal.

In both cases they are public officers, and the undertakings which they furnish for their fidelity should be construed as official bonds, since the relation between the deputy and his principal, in neither case, is contractual.

Agreements by the principal to appoint deputies cannot be upheld as contracts, and are void as against public policy.²⁵

Rowley vs. Howard, 23 Cal. 401; Robinson vs. Hall, 33 Kan. 139; 5 Pac. 763; Samuels vs. Shelton, 48 Mo. 444.

Gibbens vs. Pickett, 31 Fla. 147; 12 South. 17, *Taylor, J.*: "While our statute in express terms authorizes sheriffs to appoint deputies to act *under them*, who shall have the same power as the sheriffs appointing, and for whose neglect and default in the execution of their office the sheriff shall be responsible, still there is nothing more in this Statute than a declaration of that which was common law on the subject from time immemorial in England and in this country, and we can see nothing in the Statute that creates in a 'deputy sheriff' any independent distinctive official power or authority, except such as he derives *as deputy* from and through his principal. The term 'deputy' necessarily carries with it the idea

that he has a principal, and that he can not act independently in his own name and stead, but performs all official acts of this kind in the name and stead of such principal for whom, *as deputy*, he is alone authorized to act. If he undertakes to act in his own name and on his own authority, then he no longer acts *as deputy*, but as an independent official recognizing no official superior."

²³ Eastman vs. Curtis, 4 Vt. 616; Calender vs. Olcott, 1 Mich. 344; Westbrook vs. Miller, 56 Mich. 148; 22 N. W. 256; Gilkey vs. Cook, 60 Wis. 133; 18 N. W. 639.

²⁴ State vs. Jefferson, 66 N. C. 309; Van Slyke vs. Trempealeau Ins. Co., 39 Wis. 390; Jacquemine vs. State, 48 Miss. 280.

²⁵ Hager vs. Catlin, 18 Hun 448; Stout vs. Ennis, 28 Kan. 706.

But see Hoge vs. Trigg, 4 Munt. (Va.) 150.

Where the statute does not fix the terms and amount of the deputy's bond, the undertaking may be for such amount and in such form as the principal and his deputy shall agree.²⁶

The bond is for the protection of the principal officer, and not the public; yet it cannot well be governed in its construction by the rules that apply to bonds to secure a private contract, because the duties and powers of the deputy are subject to the same changes and limitations which affect the office of the principal. The rules of construction therefore which relate to official bonds should be applied.²⁷

§148. Qualification and approval of sureties.

Sureties upon official bonds must have the same contractual capacity which is required in the making of any form of contract, and unless they have all the necessary qualifications to make a simple contract, they are not eligible as sureties.

Persons of unsound mind or who are under disability of infancy, or in some States, coverture, cannot become Surety.²⁸

Not all persons, however, who have proper capacity to make simple contracts, are eligible as sureties upon official bonds.

A corporation, other than those organized for the special purpose of making contracts in Suretyship,²⁹ cannot become Surety, since the act would be *ultra vires*, it being no part of the corporation purpose to use the corporation in performing acts of mere friendship or accommodation to others.³⁰

²⁶ *Gradle vs. Hoffman*, 105 Ill. 147.

²⁷ *Hubert vs. Mendheim*, 64 Cal. 213; 30 Pac. 633.

Contra—*Mullin vs. Whitmore*, 74 N. C. 477.

"The defendants insist that their bond shall be interpreted by the rules which govern the construction of the official bonds of a high sheriff, drawn in pursuance of the Statute, specifying what bonds shall be given and the conditions of the same. But there is a wide difference

between them in almost every respect. The one is an official bond of a public officer, the form and conditions of which are fixed by law; the other is a private bond of an individual, for which no form is prescribed and in which any conditions may be inserted which will carry out the intent of the parties."

²⁸ Ante Sec. 11.

²⁹ Post Chap. IX.

³⁰ That a corporation cannot become an accommodation indorser or guarantor in commercial transac-

Certain other persons are prohibited by statutes from becoming Surety, such as provisions of law that only those residing in the same County or State where the bond is to be filed shall be accepted as Surety,³¹ or statutory requirements that the Surety possess a certain amount of tangible property subject to execution within the State.

The approval of bonds by those given authority to determine whether the persons approved as Surety have the qualification required by law, have been held to be judicial acts.³²

There seems to be a special ground for considering the approval a judicial act, in those cases where the law declares the office vacant upon failure to file a bond, as refusal to approve a bond in such a case, might result in the vacation of the office.³³

The approval of the bond will be presumed from its accept-

tions, unconnected with its regular business, has been the holding of a large number of well considered cases. *Bank of Genesee vs. Patchin Bank*, 13 N. Y. 309, *Denio, J.* (314): "It is quite clear that the officers of a banking association or other corporation have no power to engage the institution as the surety for another, in a business in which it has no interest. Such a transaction is without the scope of the business of the company. The authority of the governing officers of a corporation, to affect it by their contracts in its name, is of the same general character as that which a partner has to bind the firm. In either case, if they contract in a matter to which the business of the corporation or partnership does not extend, their engagements are invalid as against the corporation, for want of authority to conclude those in whose behalf they assume to act."

Park Nat'l Bank vs. German, etc.,

Co., 116 N. Y. 281; *Lafayette Savings Bank vs. St. Louis Stoneware Co.*, 2 Mo. App. 299; *Culver vs. Reno Real Est. Co.*, 91 Pa. 367; *Lucas vs. White Line Transfer Co.*, 70 Iowa 541; 30 N. W. 771; *Hall vs. Auburn Co.*, 27 Cal. 256.

³¹ Sureties will be estopped from claiming their non-residence as a defense. *Board of School Directors vs. Brown*, 33 La. Ann. 383; *State vs. Flinn*, 77 Ala. 100.

³² *State vs. Dunnington*, 12 Md. 340; *Ex parte Harris*, 52 Ala. 87; *Swan vs. Gray*, 44 Miss. 393; *Bay Co. vs. Brock*, 44 Mich. 45; 6 N. W. 101.

But see *Boone Co. vs. State*, 61 Ind. 379. Holding that the refusal to approve a bond is a ministerial act and that mandamus will lie to compel the officer to approve the bond or show cases why he does not.

See also *Speed vs. Common Council*, 97 Mich. 198; 56 N. W. 570.

³³ *Knox Co. vs. Johnson*, 124 Ind. 145; 24 N. E. 148.

ance and retention without objection.³⁴ Failure to approve a bond does not constitute a defense to the Surety.³⁵

§149. The signing of the bond by the principal.

The omission of the name of the principal as one of the signers of an official bond, even where his name appears in the body of the instrument as an obligor, is a mere technical defect and will not release the Surety except in those cases where the Surety signs upon condition, known to the obligee, that the bond is not to take effect until signed by the principal.

The Sureties are not injured by the failure of the principal to sign, if they are compelled to pay the penalty of the bond because of the default of the principal, they can recover the amount back from the principal whether he signed the bond or not.³⁶

Where the bond is accepted and approved without the signature of the principal and the latter enters upon his office by reason of the reliance of the obligee upon the bond, it would be giving the Sureties the benefit of the contract without imposing its burdens to permit them to escape liability.³⁷

It has been held that where the statutes require the principal to sign, that the instrument is incomplete without his signature, and does not bind the Sureties except where the obligee is able to show affirmatively that the Sureties intended to waive the execution by the principal.³⁸

³⁴ *Postmaster Gen'l vs. Norvell*, Gilp. 106; *Pierce vs. Richardson*, 37 N. H. 306.

³⁵ *Boone Co. vs. Jones*, 54 Iowa 699; 2 N. W. 987; *Trustees vs. Sheik*, 119 Ill. 579; 8 N. E. 189; *Mowbray vs. State*, 88 Ind. 324; *Young vs. State*, 7 Gill & John. (Md.) 253; *People vs. Huson*, 78 Cal. 154; 20 Pac. 369; *Paxton vs. State*, 59 Neb. 460; 81 N. W. 383; *Estate of Ramsay vs. People*, 197 Ill. 572; 64 N. E. 549; *Deer Lodge County vs. U. S. F. & G. Co.*, 42 Mont. 315; 112 Pac. 1060.

³⁶ *Trustees vs. Sheik*, 119 Ill. 579; 8 N. E. 189; *Deer Lodge County vs. U. S. F. & G. Co.*, 42 Mont. 315; 112 Pac. 1060. In which it was also held that where the signing of a bond was upon condition that the principal sign, which condition was

known to the obligee, it was considered that the failure of the principal to sign constituted a valid defense.

Empire State Surety Co. vs. Carroll Co., 194 Fed. 593; 114 C. C. A. 435. Holding that where the principal, in the absence of a bond, would nevertheless be liable for the acts constituting the breach, the failure of the principal to sign does not relieve the surety, even though the bond recites a joint obligation.

³⁷ *McLeod vs. State*, 69 Miss. 221; 13 South. 268; *Hall vs. State*, 69 Miss. 529; 13 South. 38.

³⁸ *Johnston vs. Kimball*, 39 Mich. 187, *Campbell, C. J.*: "Where several names are written as co-obligors and one of them is called upon to sign it, he does so upon an implied understanding that he can in

It is also held that if the bond recites a joint obligation, naming the principal as one of the joint obligors, the instrument does not take effect against any of the parties until the principal signs.³⁹

§150. Liability of sureties as affected by failure to deliver or furnish the bond within the time required by law.

The statutes of the various States have provided with much uniformity the time within which a person elected or appointed to a public office must submit his bond for approval. These statutes usually add as a penalty for failure to give the bond that the office shall become vacant.

A difference of construction prevails whether the statutes as to the penalty creating a vacancy are mandatory or merely directory. If the former, then at the expiration of the limit fixed by statute, the office is forfeited without judicial determination, and the tender and acceptance of a bond after such date will not revive the office nor involve any liability upon the bond, and on the other hand, if the statute is merely directory the bond may be filed on a later day, and if approved the nominal infraction of law will be deemed waived.

The preponderance of authority supports the view that although the statute recites in plain terms that the office shall be-

case of being held responsible, not only have his right to contribution, but a further right to have it capable of proof and enforcement according to the terms of the contract as it purports to be drawn up. And he has right to insist that he will not be hound except upon his own terms, reasonable or unreasonable. It is for himself and not for others to determine these terms. And if it is claimed he has waived them, or become estopped from relying on them, the burden of proof ought not to be laid upon him to show that there has been no variance, but upon the plaintiff to show what is substantially a new contract. . . .

It was claimed on the argument that the sureties would have a right of contribution against the treasurer at any rate, whether he did or did not sign the bond with them. This may be true, but if he had signed the bond, he would not only be estopped by the judgment from contesting his liability, but the sureties could require recourse to his property to satisfy the execution before seizure of theirs. These are not barren advantages."

See also *Bean vs. Parker*, 17 Mass. 603; *Ferry vs. Burchard*, 21 Conn. 597; *Bunn vs. Jetmore*, 70 Mo. 228.

³⁹ *People vs. Hartley*, 21 Cal. 585.

come vacant by failure to deposit the bond within the time prescribed by law, yet such failure does not *ipso facto* create a vacancy nor prevent the officer from thereafter qualifying, providing the bond is furnished before steps are taken to declare the office vacant.

In reaching this conclusion, the courts have many times disregarded what seems to be the clear and unambiguous language of the statute in order to give effect to the maxim of the common law that "forfeitures are never favored."⁴⁰

⁴⁰ State vs. Ruff, 4 Wash. 234; 29 Pac. 999, *Hoyt, J.*: "Under our statute it is the election which gives the right to the office, and the qualification is only an incidental requirement for the protection of the public. If the provisions for such qualification are not timely complied with the public can protect itself by declaring a vacancy and filling the same by appointment, but until such acts have been done, the force of the election has not been exhausted, and upon compliance with the incidental duty of qualification is given full force." The statute upon which this construction is based provides that "Every office shall become vacant on the happening of either of the following events before the expiration of the term of such officer: *Sixth*, his refusal, or neglect to take his oath of office, or to give or renew his official bond, or to deposit such oath or bond within the time prescribed by law." The dissenting opinion in this case states clearly the opposing view. "I am unable to agree with the majority. Nor do I think that a plain statutory enactment setting forth specifically circumstances under which an office becomes vacant should be construed out of existence by the mere statement of the theoretical rule that 'forfeitures are ab-

horred by the Courts.' What the courts abhor should be of very little consequence. The vital question is, what did the Legislature intend? I think it an excellent idea for courts to give the statutory language its plain and ordinary meaning. . . . It seems to me that if the legislature had desired to enact that an office should become vacant upon the refusal or neglect of the officer-elect to take his oath of office or to give or renew his official bond within the time prescribed by law, it could not have expressed itself in language more clear or unambiguous. Nothing is said about a 'forfeiture being declared by the proper authority,' that is an idea expressed by the majority opinion, but it is not found anywhere in the law."

See also, *Chicago vs. Gage*, 95 Ill. 593; *People vs. Holley*, 12 Wend. 481; *State vs. Churchill*, 41 Mo. 42; *State vs. Falconer*, 44 Ala. 696; *State vs. County Court*, 44 Mo. 230; *Kearney vs. Andrews*, 10 N. J. Eq. 70; *State vs. Colvig*, 15 Ore. 57; 13 Pac. 639; *Ross vs. Williamson*, 44 Ga. 501; *Paxton vs. State*, 59 Neb. 460; 81 N. W. 383.

In South Carolina the statute recites that upon failure to file a bond within a specified time the "office shall be deemed absolutely vacant," and it is held that the failure to file the bond does not *ipso facto* va-

If an officer though in default tenders his bond, and it is accepted, the public by this act waives the right to declare the office forfeited.⁴¹

Where the statute provides that the office shall become vacant by failure to file a bond, although such statute is construed to be merely directory, it is held that a judicial determination of the existence of a vacancy is not necessary, and that an appointment to fill the vacancy thus created may be made as soon as the limit expires for filing the bond.⁴²

The statute in some instances provides that the failure of the officer to file his bond, *ipso facto*, works a forfeiture of the office. A statute in this form creates a vacancy without judicial determination.⁴³

The literal provision of the statute has been followed by some courts which hold that the requirement for filing the bond within a specified time is mandatory, and supersedes the common law rule that forfeitures are not favored.⁴⁴

cate the office. *State vs. Toomer*, 7 Rich. Law Rep. 216; *Cronin vs. Stoddard*, 97 N. Y. 271.

⁴¹ *Schuff vs. Pflanz*, 99 Ky. 97; 35 S. W. 132. "Upon the failure to execute any bond required of this official, for the protection of the State, county or citizens, the county court may remove him from office; and particularly where by statute it is made the plain duty of the official to execute the bond on a particular day. The duty thus devolves on the sheriff and he must comply with the law; but it does not follow because the sheriff fails to renew his general bond or to give an annual bond for the collection of the revenue that the county judge is powerless to accept a bond after the first Monday in January. He may, it is true, vacate the office, but before he does this he accepts a bond . . . and when accepted, the sheriff having previously qualified, it is then too

late to enter an order vacating the office."

Cawley vs. People, 95 Ill. 249.

⁴² *State vs. Tucker*, 54 Ala. 205; *State vs. Lansing*, 46 Neb. 514; 64 N. W. 1104.

But see *Cronin vs. Stoddard*, 97 N. Y. 271.

⁴³ *State vs. Beard*, 34 La. Ann. 273.

⁴⁴ *People vs. Perkins*, 85 Cal. 509; 26 Pac. 245; *Johnson vs. Mann*, 77 Va. 265; *In re Atty. Gen.*, 14 Fla. 277.

See also *Falconer vs. Shoves*, 37 Ark. 386. The holding in this case is that the failure to tender a bond gives to the officer holding the appointing power the right to immediately appoint another to the office, and that the tender of a bond after the appointment has been made will not restore the claimant to the office so forfeited.

If the officer fails to make a seasonable delivery of his bond, and defaults occur after entering upon the duties of his office, but before the bond is approved, the sureties will be liable, where the language of the bond covers the term of office, either by specifying the date of the beginning of the term or by the use of such words of general description as may fairly be interpreted to mean the entire term.⁴⁵

§151. Sureties upon official bonds discharged by alterations to which they do not consent.

While it may be asserted that the law does not favor a forfeiture in the matter of official bonds, such a rule will not be extended so as to violate any fixed contract right of the Surety.

The interests of the public require that a bond to secure the performance of official duty shall be made effective if possible, and not defeated by a mere technicality involving no hardship upon the Surety, such as a failure to file a bond on the exact day required by law, as considered in the preceding section.

But public interest must yield to individual rights, and it is the right of any contracting party, and especially an obligor in suretyship, to stand upon the strict letter of his undertaking. An alteration of a bond by decreasing the amount of the penalty violates the right of the Surety as much as if the penalty had been increased, and it is immaterial that the one benefits the Surety by reducing his burdens.⁴⁶

An immaterial change in the bond, which neither adds nor takes away any obligation, will not release the Surety.⁴⁷

⁴⁵ Hatch vs. Attleborough, 97 Mass. 533.

⁴⁶ Board of Commissioners vs. Gray, 61 Minn. 242; 63 N. W. 635; Miller vs. Stewart, 9 Wheat. 680.

See also People vs. Brown, 2 Doug. (Mich.) 9; Mitchell vs. Burton, 2 Head (Tenn.) 613; Doane vs. Eldridge, 16 Gray 254.

⁴⁷ Rudesill vs. County Court of Jefferson Co., 85 Ill. 446.

State vs. Berg, 50 Ind. 496. In this case, the bond of a township trustee recited that the principal should render an accounting to the Board of Commissioners. "at its March term, 1868." This was altered by the addition of the years "1869 and 1870." This was held an immaterial alteration. This holding was based upon the fact that the law required the officer to make his

The addition of the name of a new Surety without the knowledge of the first Surety is not a material alteration.⁴⁸

It has been held that where the body of the bond became mutilated by an accident, and the signatures were cut off and attached to a copy, that the sureties were liable.⁴⁹

If a Surety signs a Bond in blank and intrusts it to the principal, he cannot thereafter complain that the amount of the penalty is filled in by another, and such other additions made as are necessary to give the instrument effect.⁵⁰

§152. Alteration in the duties of the principal by amendment to the law.

It is the settled rule as to official bonds that they include liability not only for default in the performance of duties imposed by the law in force at the time of the execution of the bond, but also extend to all duties which may from time to time be added to the office by amendment to the law.

This results from the essential distinction between a bond to secure a contract, and a bond to secure performance of a public duty. The latter does not relate to default in contractual duties and is unaffected by the rules which protect sureties who undertake to indemnify against a breach of contract.⁵¹

Sureties upon official bonds are held to contemplate a possible amendment to the law and to stipulate, by implication, to be responsible for the performance of all duty thus added. Such a rule is indispensable to the proper management of public affairs, the only limitation being that the new duties imposed shall be of the same general character as those described by statute at the time of the execution of the bond.

Thus the legislature, by an act subsequent to the execution of a bond of a loan commissioner, transferred to the custody of

report at the times inserted in the bond, and that the duty derives no additional force from the terms of the bond.

⁴⁸ Governor vs. Lagow, 43 Ill. 134.

⁴⁹ State vs. Harney, 57 Miss. 863.

⁵⁰ Rose vs. Douglas Tp., 52 Kan. 451; 34 Pac. 1046; Dedge vs. Branch, 94 Ga. 37; 20 S. E. 651.

⁵¹ Ante Sec. 163.

such commissioner money held by another officer,⁵² or where the legislature, after the election and qualification of a sheriff, amends the law of procedure and adopts a new code materially changing the duties of such officer, the sureties will be liable for defaults of the officer in executing process under the new procedure,⁵³ also where the duties of City Treasurer are added to the office of County Treasurer.⁵⁴

While sureties upon an official bond will not be liable for defaults in the performance of added duties, which are not of the same general character as those which were incumbent upon the officer at the time the bond was executed, yet they will not thereby be discharged as to defaults in the regular duties of office.

Thus a collector of customs was by act of Congress required to

⁵² *People vs. Vilas*, 36 N. Y. 459, *Grover, J.*: "The analogy between this class of cases and the contracts of individuals fails in this respect. In the latter no alteration can be made without the mutual assent of both parties. In the former, the Legislature have power at any and all times to change the duties of officers, and the continued existence of this power is known to the officer and his sureties, and the officer accepts the office and the sureties execute the bond with this knowledge. It is, I think, the same in effect as though this power was recited in the bond. Had this been done it would not be claimed that the sureties were discharged by its exercise. . . . In the absence of authority determining the question otherwise, my conviction is, that any alteration, addition or diminution of the duties of a public officer made by the Legislature, does not discharge his official bond or the sureties thereon so long as the duties required are the appropriate functions of the particular officer. That all

such alterations are within the contemplation of the parties executing the bond. That imposing duties of another description, and not appropriate to the office, would discharge sureties, not coming within such contemplation."

See also *Board of Education vs. Quick*, 99 N. Y. 139; 1 N. E. 533; *Colter vs. Morgan*, 12 B. Mon. (Ky.) 278; *Hughes vs. Board of Comrs.*, 50 Okla. 410; 150 Pac. 1029.

The same principle is extended to any bond given in pursuance of the requirements of law although the obligor is not strictly a public officer, such as the bond given by a distiller in compliance with the Federal Statutes, conditioned that he will observe the law in relation to the business of distilling. *United States vs. Powell*, 14 Wall. 493.

⁵³ *King vs. Nichols*, 16 O. S. 80.

See also *Marney vs. State*, 13 Mo. 7.

⁵⁴ *Dawson vs. State*, 38 O. S. 1. See also *Commonwealth vs. Holmes*, 25 Gratt. 771; *United States vs. McCartney*, 1 Fed. Rep. 104; *Prickett vs. People*, 88 Ill. 115.

pay over to his superior officer the money collected by him; subsequently, and after the execution of his bond, he was required by the United States to disburse funds in his hands for purposes outside the scope of his duties as collector, such as the building of a Marine Hospital and the furnishing of supplies to the naval service. It was held that the Sureties would not be liable for defaults in the performance of the new duties, but would be liable for the obligations originally created.⁵⁵

An increase or diminution of the compensation of a public officer will not release the sureties upon his bond.⁵⁶

The implied assent which the obligors upon official bonds are deemed to give, that they will be bound for all added duties which the legislature may impose, is necessarily limited to those

⁵⁵ *Gausson vs. United States*, 97 U. S. 584, *Strong, J.*: "The first special plea requires a more minute examination. It was, in effect, that the obligation of the bond had been discharged, not directly, but because the principal obligor had been required to perform, and had performed, duties additional to those which pertained by law to his office when the bond was made. It does not aver that the additional duties changed the character of the office, or increased the responsibility of the collector for the money received by him as collector of customs. How, then, the requisition of duties not inconsistent with accounting for and paying over money received by him as collector of customs can operate to release his bond is quite incomprehensible. If it be conceded, as it may be, that the addition of duties different in their nature from those which belonged to the office when the official bond was given will not impose upon an obligor in the bond, as such, additional responsibilities, it is undoubtedly true that such an addi-

tion of new duties does not render void the bond of the officer as a security for the performance of the duties at first assumed. It will still remain a security for what it was originally given to secure."

See also *Board of Supervisors vs. Clark*, 92 N. Y. 391.

But see *Pybus vs. Gibb*, 6 Ell. & Bl. 902. In this case the jurisdiction of a bailiff was increased whereby new duties were imposed with additional fees, held—"It may be considered settled law that, where there is a bond of suretyship for an officer, and by the act of the parties or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided." The English rule stated above has not been adopted in the United States and has been somewhat modified in the later English cases. *Mailing Union vs. Graham*, 5 L. R. C. P. 201; *Skillett vs. Fletcher*, 1 L. R. C. P. 217.

⁵⁶ *Sacramento Co. vs. Bird*, 31 Cal. 66; *Loving vs. Auditor of Public Accounts*, 76 Va. 942.

changes which create new duties of the same general character, it cannot be said that parties to such transactions make their contract in contemplation of the power of the legislature to impose duties requiring different qualifications to perform, and involving exposure to defaults which could not occur under the original scope of the office.⁵⁷

§153. Extension of tenure of office by legislative act.

The extension of the Tenure of Office by act of the Legislature differs in principle from those cases in which additional duties are imposed upon a public officer.

It is essential for the protection of the rights of parties to contracts that the obligation terminate at a definite time, and while the Legislature has the power to extend the term it also has the power to provide that the officer give an additional bond for the new or extended term.

The limit as to time is as important to sureties upon official bonds as the limit in amount, and the Legislature cannot exchange either stipulation in the surety's contract without his consent.⁵⁸

⁵⁷ *Denio vs. State*, 60 Miss. 949. In this case a clerk of the court was required, by an act subsequent to the execution of his bond, to collect a license fee from attorneys and pay the same over to the county treasury, held—"The distinction is between an increase by the Legislature of the duties of an office of the same nature or like kind as those before pertaining to it, after the execution of the bond, and the addition of new duties, not of the same nature or kind with those before belonging to it. Every official bond is executed with a knowledge of the right, and the practice of the Legislature, to enlarge the duties of the officer, and for every additional duty imposed by competent authority, which is not in kind, but

in degree, merely different from those before pertaining to the office, and leaves the office unchanged in its functions, the bond before given may be fairly held to be a security, while for any duty, not pertinent in its nature to the office as existing when the bond was given, it cannot be justly said to have been within the contemplation of the obligators that they should be bound for them, and they are not so bound."

See also *County of Spokane vs. Allen*, 9 Wash. 229; 37 Pac. 428; *White vs. East Saginaw*, 43 Mich. 567; 6 N. W. 86; *District of Columbia vs. Peltz*, 37 App. D. C. 156.

⁵⁸ *Peppin vs. Cooper*, 2 Barn. & Ald. 431; *Bigelow vs. Bridge*, 8 Mass. 274; *Moss vs. State*, 10 Mo.

Where the bond recites that it covers the term of office, and until the successor of the principal is elected and qualified, it is sufficiently definite to bind the sureties and they will be liable for defaults for a reasonable time beyond the termination of the statutory term.⁵⁹

The necessary delay in the qualification of the successor in office, arising from accident or other cause, might be considered as within the contemplation of the parties, but a consent to an extension of the term cannot fairly be implied from such contract.

But where an appointment is to a permanent office having a definite and limited term, the obligation of a surety is not extended beyond the term for which the appointment is made though the statute provides for his continuation in office beyond the term.^{59a}

§154. Special bonds given by officers who have also given general bonds.

Where a public officer who has already given bond, is required by law to give additional bond to secure the performance of some special duty, the General Bond is not liable for defaults in the matter of the special duty, neither is the Special Bond liable for acts in the line of the general duty of the officer.

Without the requirement and acceptance of the Special Bond the sureties upon the General Bond in many instances would be liable for defaults in the performance of new and special duties added to the office after the making of the bond.⁶⁰ But the

338; *State Treasurer vs. Mann*, 34 Vt. 371; *Patterson vs. Freeland Tp.*, 38 N. J. L. 255; *Miller vs. Stewart*, 9 Wheat. 680; *Dover vs. Twombly*, 42 N. H. 59; *Smith vs. United States*, 2 Wall. 219; *Welch vs. Seymour*, 28 Conn. 387; *Brown vs. Latimore*, 17 Cal. 93; *King Co. vs. Ferry*, 5 Wash. 536; 32 Pac. 538; *Mullikin vs. State*, 7 Blackf'd (Ind.) 77.

Contra—*Commonwealth vs. Drewry*, 15 Gratt. (Va.) 1.

⁵⁹ *Baker City vs. Murphy*, 30 Ore. 405; 42 Pac. 133; *Administrator vs. McKowen*, 48 La. Ann. 251; 19 South. 328; *Long vs. Seay*, 72 Mo. 648; *Montgomery vs. Hughes*, 65 Ala. 201; *Taylor vs. Sullivan*, 45 Minn. 309; 47 N. W. 802; *Thomp-*

son vs. State, 37 Miss. 518. These cases arise under a statute providing that a public officer shall hold over until his successor shall qualify. Where there is no such statute the rule has not always been applied. *Illinois Industrial Home vs. Dreyer*, 150 Ill. App. 574.

Norridgevock vs. Hale, 80 Me. 362; 14 Atl. 943.

Where a treasurer misappropriated public funds on the day following the expiration of his term and before his successor had qualified, held—the sureties were not liable.

See also *Dover vs. Twombly*, 42 N. H. 59.

^{59a} *American Surety Co. vs. Gas-* kill, 85 Vt. 358; 82 A. 218.

⁶⁰ *Ante* Sec. 152.

obligee impliedly waives the right to resort to such bond by requiring an additional security.

Thus where the law makes a County Treasurer the custodian of the school fund and requires a Special Bond for its protection, it was held that the sureties upon the General Bond were not liable for shortages in the school fund.⁶¹

This rule was applied even where the General Bond recited that the treasurer "shall safely keep and pay over, according to law, all moneys which come into his hands for State, county, township, school, road, bridge, poor, town, and all other purposes," the treasurer being required by law to execute a Special Bond for the protection of money coming from the sale of school lands to be used for school purposes, it was considered that the two bonds were not cumulative, and that the sureties upon the General Bond were not liable for defaults in the school funds.⁶²

Where the treasurer by virtue of his office became the custodian of a special fund, the proceeds of a sale of bonds to be used for the erection of a Court House, and gave a Special Bond in pursuance of a requirement of law, the sureties upon his General Bond were held not liable for defaults in the Court House fund.⁶³

§155. Concealment of matters material to the risk.

The rule of law that sureties will be released by a concealment by the obligee of a previous defalcation of the principal or other matters material to the risk is inapplicable to bonds executed for public officers.^{63a}

⁶¹ State vs. Felton, 59 Miss. 402; Broad vs. Paris, 66 Tex. 119; 18 S. W. 342.

Sureties upon the general bond are not liable for defaults in the performance of a special duty for which a bond is required, even though such additional bond is not in fact given. Columbia Co. vs. Massie, 31 Oreg. 292; 48 Pac. 694; County Board vs. Bateman, 102 N. C. 52; 8 S. E. 882; Costley vs. Allen, 56 Ala. 198.

⁶² State vs. Young, 23 Minn. 551; County vs. Tower, 28 Minn. 45; 8 N. W. 907.

⁶³ Board of Supervisors vs. Ehlers, 45 Wis. 281; Board of Supervisors vs. Pabst, 70 Wis. 352; 35 N. W. 337.

See also Commonwealth vs. Toms, 45 Pa. 408; State vs. Johnson, 55 Mo. 80; Williams vs. Morton, 38 Me. 47.

But see Kempner vs. Galveston Co., 73 Tex. 216; 11 S. W. 188.

^{63a} Fidelity & Deposit Co. vs. Commonwealth, 104 Ky. 579; 47 S. W. 579; 49 S. W. 467; Hogue vs. State, 28 Ind. App. 285; 62 N. E. 656.

§156. Bonds of public officers not retroactive and cover only the period named in the bond.

It is self-evident that sureties upon the bond of a public officer are not liable for acts of their principal occurring before they make their contract, except where the bond by its terms is to take effect at a date prior to its delivery or acceptance, as where an officer enters upon his duty at the beginning of his term but does not file his bond till a later date, which bond, under certain circumstances, heretofore considered,⁶⁴ operates by relation back to the first day of the term.

It is also equally self-evident that the sureties are not liable beyond the date of the expiration of the official term, which date is held to be either the day named in the bond, or in the statute, with a reasonable extension till the successor in office has qualified, where the statute so stipulates.⁶⁵

While these propositions are properly termed self-evident, yet it has not always been found easy to make the application where the officer has held office for two or more successive terms, with different sureties for each term, or has given successive bonds during the same term.

If public money is abstracted while the second bond is in force, and used to pay defalcations made under the first bond, or money is borrowed on the individual credit of the officer from outside sources to pay defaults of the first term, and public money is used in the second term to repay the loan, the situation, under either of these hypotheses, presents complications requiring judicial construction of the rights of the several sets of sureties; and in many instances it becomes a question of law as to when the defalcation took place.

The law will not, in any event, assume the burden of ascertaining for the parties when the shortage occurred, and if the parties in interest fail to present proof as to when default was committed, the law will presume the entire default occurred in the last term;⁶⁶ and if the sureties upon the last bond would

⁶⁴ *Ante*, Sec. 168.

⁶⁵ *Ante*, Sec. 171; *Ledford vs. Hinson*, 143 Ky. 428; 136 S. W. 912.

⁶⁶ *Kelly vs. State*, 25 O. S. 567; *Pine Co. vs. Willard*, 39 Minn. 125;

39 N. W. 71; *Bruce vs. United States*, 17 How. 437; *Hetten vs. Lane*, 43 Tex. 279; *Clark vs. Wilkinson*, 59 Wis. 543; 18 N. W. 481;

exonerate themselves upon the ground that the deficiency occurred during the prior term, the burden is upon them to show that fact.

In general, each bond is chargeable with all the funds received during the term, or which at any time during the term are in the treasury, which have not been properly disbursed or accounted for.

If defalcations occur in the first term which are covered by defalcations of the second term, the wrongful act would seem to be equal in extent in each term, yet each set of sureties may present plausible reasons for their complete exoneration.

The first set claiming that there is in fact no shortage; that the officer has made good his default; and that it is irrelevant to inquire from what source he received the money, whether he borrowed it, or converted it, or inherited it, in either event he paid it in, and the shortage was made good; that they are in no different situation than they would be if the principal had held concurrently two public offices, and had used the funds of one office to make good the shortage of the other, and that in no event could they be held for embezzlement of their principal in some other office.

The second set of sureties claiming that there was no default in the second term; the conversion to the use of the officer was in the first term; that the application of the revenues of the second term to the shortage of the previous term is a mere matter of bookkeeping, that no funds are in fact taken away, but it is at most an effort to conceal a former wrongful act by irregular entries in the books.

The weight of authority is that the second sureties are liable and the first exonerated,⁶⁷ and that the use of public money re-

Goodwine vs. State, 81 Ind. 109; Bockenstedt vs. Perkins, 73 Iowa 23; 34 N. W. 488; Kagay vs. Trustees, 68 Ill. 75.

But see Trustees vs. Smith, 88 Ill. 181; Phippsburg vs. Dickinson, 78 Me. 457; 7 Atl. 9.

⁶⁷ Gwynne vs. Burnell, 7 Cl. & Fin. 572; State vs. Sooy, 39 N. J.

L. 539; Crawn vs. Commonwealth, 84 Va. 282; 4 S. E. 721; State vs. Powell, 40 La. Ann. 234; 4 South. 46; Rogers vs. State, 99 Ind. 218; Supervisors Lauderdale vs. Alford, 65 Miss. 63; 3 South. 246; Frownfelter vs. State, 66 Md. 80; 5 Atl. 410.

Contra—Goodwin vs. State, 81 Ind. 109.

ceived in the second term to square the accounts of the first term, cannot be distinguished from the use of the funds to meet any other obligation of the principal.

The borrowing of money from an outside source and making good the shortage at the close of the first term is the same in effect as if the principal had paid the deficit with his own funds, and the use of public funds in the second term to pay the loan is a conversion for which the second sureties are liable.⁶⁸

Where the officer holds over but gives no bond for the second term the sureties upon the first term bond will be liable for the funds on hand at the close of the first term even though the officer converts them to his own use after entering upon the second term. The obligation to account for all money coming into his hands while acting under the bond still subsists, and the circumstance that he became his own successor and so not called upon for settlement will not relieve his sureties.⁶⁹

⁶⁸ *Ingraham vs. Maine Bank*, 13 Mass. 208.

⁶⁹ *Black vs. Oblender*, 135 Pa. 526; 19 Atl. 945.

The same principle is involved where the officer is not his own successor, but goes out of office having money of third parties in his possession; although the conversion to his own use occurs at a subsequent date, his sureties are liable.

King vs. Nichols, 16 O. S. 80. In this case the condition of the bond was that the sheriff would discharge the duties of his office "during his continuance in office." At the expiration of his term he held funds, the proceeds of an attachment proceeding, which were subject to the order of the court. Subsequently an order was made, and he failed to pay the money, held, that although the money might not be due from him during his term, and in fact converted after the expiration of his term, his sureties were nevertheless liable.

See also *Brobst vs. Skillen*, 16 O. S. 382.

Freeholders vs. Wilson, 16 N. J. L. 110. Where the officer dies and his personal representatives fail to

pay over funds which were on hand at the time of his death his sureties are liable.

Peabody vs. State, 4 O. S. 387.

Ranney, J.: "We assume that there was no breach of the official bond during the life of the justice. But does the obligation of the sureties, to see that money received by him in his official capacity is properly paid over, cease with his life, or other termination of his official term? We think not. Such a conclusion is neither warranted by the terms of the bond nor the object for which it is taken, while it would destroy all security for paying over a considerable portion of the money that must, necessarily, come into his hands. It would not stop with exonerating from liability the sureties of justices of the peace, but would extend equally to those of sheriffs, treasurers, constables, and a multitude of other public officers, who receive large sums of money which must, necessarily, remain in their hands at the termination of their official terms. The money received in this instance by the justice was held in trust for the creditor, and the only way in which the for-

If the holding over without bond is contrary to law it is considered that the sureties of the former term cannot be held liable, since under these circumstances he would be an officer *de facto* only.⁷⁰

Where the accounts of the officer at the close of his first term were approved and he became his own successor, giving a new bond, it was held that the new sureties were liable for shortages occurring in the first term, on the ground that the record of the approval was constructive notice to the sureties as to the amount which should have been turned over.⁷¹

Sureties on the bond of an official who has served several successive terms, giving separate and distinct bonds for each term, are only liable for the default occurring during the term for which the particular bond or bonds were given.^{71a}

mer could discharge himself from the trust was by paying it over, upon demand, to the latter. . . .

Until demanded, he was required to keep it safely; and when demanded, whether he was then in or out of office, to pay it over to the person entitled. This his sureties bound themselves he should do, and a failure to do it is a breach of their bond. When they assumed the obligation, they must be presumed to have known that, in the regular exercise of the duties of his office, it would probably terminate with money in his hands, and to have contemplated the various contingencies by which it might be brought to a close before the regular period for which he was elected. One of these was death; and in such a case they knew very well that the obligations resting upon him in respect to such funds, were by law cast upon his personal representative."

See *Iso Great Falls vs. Hanks*, 21 Mont. 83; 52 Pac. 785; *Allen vs. State*, 6 Blackr. (Ind.) 252.

But if the officer holds over and gives a new bond, the sureties of the second bond are liable for what he had on hand at the close of his first term. *Trustees vs. Arnold*, 58 Ill. App. 103.

⁷⁰ *Wapella vs. Bigham*, 10 Iowa 39; *Scott Co. vs. Rings*, 29 Minn. 398; 13 N. W. 181; *Bennett vs. State*, 58 Miss. 556.

⁷¹ *Morley vs. Metamora*, 78 Ill. 394, *Scott, C. J.*: "It is not made to appear very clearly, that whatever default occurred took place in the first year the supervisor was in office; but, conceding that fact, we do not think it relieves the sureties on the bond upon which this action is brought, from liability. The supervisor was his own successor in office. He had made his annual report, in which he charged himself with having a certain amount of money in his hands. That report was approved, and we must presume it was true. When he was re-elected it was in his own hands as his own successor. These facts appeared upon the public records of the town. The new securities upon the official bond of the supervisor must be held to have had notice of what appeared on the public records. In contemplation of law, the money mentioned in his report was in the hands of the supervisor, and the undertaking of the sureties on his bond was that he should account for it. It was as much his duty to account for whatever funds were in his hands at the end of the first year, as it was to account for whatever should be received during the second year."

^{71a} *People vs. Bowman*, 147 Ill. App. 67; *Board of Education vs. Robinson*, 81 Minn. 305; 84 N. W. 105; *State vs. Causey*, 93 S. C. 300; 76 S. E. 707.

The burden of proof is on the last surety to show that the defalcation in fact occurred during a prior term.^{71b}

§157. Same subject — Where the wrongful act was partly in one and partly in another term.

If an officer enters upon the performance of a duty before the close of his first term, and completes the duty in his second term, the sureties upon the first bond will generally be liable for his default, irrespective of the time when the default occurred.

If a sheriff levies execution, and before the return day becomes his own successor in office, and files a new bond, his default in not paying over the money made on the execution will be a liability against the first sureties, and not the second, even though the money came into his hands during the second term, and was thereafter converted. It is considered an indivisible duty and in its entirety dates from the levy.⁷²

§158. Second bond given in the same term cumulative.

A bond given in pursuance of a requirement of the law, during a term in which the officer has already given a bond, and which covers the same duties included in the first bond, is a cumulative obligation and does not release the sureties upon the former bond given from liability for defaults committed after the execution of the second undertaking.⁷³

It is held that the second bond is liable for the defaults of the entire term including the defaults committed before its execution.⁷⁴

If the new bond recites that it is in substitution of the former bond, it will exonerate the first sureties and place upon the second set the entire burden for the term.⁷⁵

^{71b} Board of Education vs. Robinson, *supra*.

⁷² Elkin vs. People, 4 Ill. 207; State vs. Roberts, 12 N. J. L. 114; Tyree vs. Wilson, 9 Gratt. (Va.) 59; Wooddell vs. Bruffy, 25 W. Va. 465.

But see Ingram vs. McCombs, 17 Mo. 558; Sherrell vs. Goodrum, 3 Humph. 419.

⁷³ Finch vs. State, 71 Tex. 52; 9 S. W. 85; State vs. Crooks, 7 O. (Pt. 2) 221; Allen vs. State, 61 Ind.

268; State vs. Sappington, 67 Mo. 529; Moore vs. Boudinot, 64 N. C. 190.

⁷⁴ State vs. Moses, 18 S. C. 366; Miller vs. Moore, 3 Humph. (Tenn.) 189.

But see Poole vs. Cox, 9 Ired. L. (N. C.) 69.

⁷⁵ State vs. Finn, 23 Mo. App. 290.

But see Thompson vs. Dickerson, 22 Iowa 360.

§159. Liability of surety for the negligence or error in judgment of a public officer.

A public officer by accepting the trust tendered him through his appointment or election to office impliedly warrants that he has the capacity to fill the position, and the bond which he gives covers not merely his wilful defaults, but also those resulting from want of care or lack of judgment.

The public from whom the franchise is derived may exact full protection against all loss resulting directly or indirectly from the conduct of the officer.

Wherever the law imposes upon a public officer the performance of ministerial duties, the public officer and his bond will be liable to any individual for any injury he may sustain in consequence of the misfeasance, malfeasance or nonfeasance of such officer in respect to those duties imposed upon him.^{75a}

Thus where a clerk of the Court omitted to insert in a record of a judgment the amount recovered, and the judgment creditor lost his remedy in execution by reason thereof, the sureties upon the bond of the clerk were held liable,⁷⁶ and where the clerk failed to enter a judgment upon the records of the Court, and the creditor thereby lost his lien upon the defendant's land, the sureties were held liable for such damages as resulted to the creditor, a subsequent lien having intervened.⁷⁷

So also where an officer seizes property in execution or attachment and through want of proper care it is damaged while in his possession,⁷⁸ or a clerk of Court loses papers entrusted to his keeping which results in damage to a litigant.⁷⁹

It has been held that where the officer is charged with the duty of approving a bond, that his approval of an insufficient bond creates a liability against him and his sureties.⁸⁰

^{75a} *Gutschenritter vs. Whitmore*, 139 N. W. 567; 158 Ia. 252; *Smith vs. Zimmer*, 125 P. 420; 45 Mont. 282; *Howley vs. Scott*, 143 N. W. 257; 123 Minn. 159.

⁷⁶ *Governor vs. Dodd*, 81 Ill. 162. See also *Norton vs. Kumpe*, 121 Ala. 446; 25 So. 841; *People vs. Smith*, 123 Cal. 70; 55 Pac. 765; *Payne vs. Baehr*, 95 Pac. 895; 153 Cal. 441.

⁷⁷ *Strain vs. Babb*, 30 S. C. 342; 9 S. E. 271.

⁷⁸ *Witkowski vs. Hern*, 82 Cal. 604; 23 Pac. 132.

⁷⁹ *Rosenthal vs. Davenport*, 38 Minn. 543; 38 N. W. 618.

⁸⁰ *Topping vs. Windley*, 99 N. C. 4; 5 S. E. 14; *Spain vs. Clements*, 63 Ga. 786.

Contra—*People vs. May*, 158 Ill. App. 596. In this case the court

The sureties of a public officer are not liable for errors in the judgment of their principal except where those errors result from negligence or failure to make the proper effort to ascertain the duty to be performed.⁸¹

The liability for errors of judgment is not evaded by showing that the officer acted upon the advice of others. Where a duty is enjoined by law it must be observed, even though the officer is advised by the Attorney General of the State that it need not be observed, or that the duty does not exist.⁸²

§160. Liability of sureties for failure of public officer to account for the use of public funds.

The liability of public officers to account to the people for interest collected upon public funds is established in this Country by the weight of authority.

Independent of statutory provision, by which many of the cases are controlled, it is said as a basis of the rule that interest is always merged in the principal, and belongs to the owner of the fund, also that it is an affront to law and morals for a trustee to use in his own behalf the subject of his trust.

It is not disputed by any advocate of a contrary doctrine that interest belongs to the owner of the fund which earns it, but the somewhat novel proposition has been advanced that the relation of debtor and creditor exists between the officer and the people, and that the fund therefore belongs not to the people, but to the officer, and he having given bond to absolutely return the amount to the people at the termination of his office, or account for its disbursement, it is no affair of the public what he does with it in the meantime.

This argument carries with it as a necessary deduction a denial of any trust relation as to the public fund.

said the act of a clerk approving the bond of a surety is a quasi-judicial act and the person injured by the negligence of the clerk can recover damages only when it is established that the act of the clerk was maliciously and wilfully done. See also Huebner vs. Nims, 132 Mich. 657; 94 Mich. 180.

⁸¹ United States vs. McClane, 74 Fed. Rep. 153; Alexandria vs. Corse, 2 Cranch (C. C.) 363; State vs. Chadwick, 10 Oreg. 465; Salt Lake County vs. Clinton, 117 P. 1075; 39 Utah 462; Wilson vs. Spencer, 135 N. W. 546; 91 Neb. 169.

⁸² Dodd vs. The State, 18 Ind. 56.

The question as to whether the public or the officer is the owner of the fund is in some cases determined by the form of the statute prescribing where the fund shall be kept, or a method of periodical counting and auditing of the money in the treasury. Those expressions in the statute which require the treasurer to deliver to his successor "all money belonging to his office," or which require the proper auditing officer to "see that all money belonging to the state is in the treasury" indicates an intent by the Legislature to fix the title of the fund in the State.

But independent of such statute, there is great force in the hypothesis that the public and not the officer has title to the funds. There is an almost universal acquiescence in the rule that a public officer is not liable for money lost by the act of God or a public enemy. Even the courts which hold him for loss by failure of a bank of undoubted solvency at the time of deposit, concede that he is entitled to relief against loss from these causes.⁸³ If it was the officer's own money which was so lost, if the bond took the place of the funds and created the relation of debtor and creditor, it is manifest that the officer and his bond must respond to the full amount of the shortage, whatever the cause.

Where the statute expressly prohibits the officer from making a loan and the funds are nevertheless invested on deposit upon the agreement to pay interest, the sum earned, although in violation of the law, belongs to the treasury by better right than to the officer, since the former owns the principal by which it accrued and the latter does not, and furthermore to require it to be turned in to the public treasury avoids the inconsistency of permitting an officer to deliberately violate the law and to profit by his own wrong.

The position reached in nearly all the States now is, that the public officer is simply a custodian of the fund, and that the relation is in the nature of a bailment or trust, and not that of debtor and creditor, and that this relation exists, whether the

⁸³ Post Sec. 167.

statute directs the mode of keeping the funds or not, and that, the officer must account for interest earned by public money.⁸⁴

⁸⁴State vs. McFetridge, 84 Wis. 473; 54 N. W. 1; 54 N. W. 998.

The Court in this case summarizes the various positions taken in this country upon the question as follows:

"(1) Those which hold that the officer owns the public funds which came into his hands, and for that reason cannot be required to account for gains derived therefrom. (2) Those which hold that, although the officer is not the owner of the funds, if he unlawfully use the same for his own profit, his gains cannot be recovered in an action on his official bond. (3) Those which hold that he is not such owner, and that his liability to account for the public funds coming into his hands is absolute, or at least equal to the common law liability of a common carrier for the safe transportation and delivery of goods committed to it for carriage, and yet that for any profit or gain made by the officer out of the use of such funds he must account to the owner of the funds, whether the same was made lawfully or unlawfully. (4) Those which hold that if the officer, not being such owner, makes gains out of the public fund by the lawful use thereof, such gains attach to the fund by way of accretion or increment and become a part of it, and belong to the owner of the fund, and, if not accounted for, an action at law may be maintained on the official bond of the officer, against him and his sureties, to recover such gains."

Wilkes-Barre vs. Rockafellow, 171 Pa. 177; 33 Atl. 269; Richmond Co. Supv. vs. Wandel, 6 La. 33; affirmed, 59 N. Y. 645; United States

vs. Mosby, 133 U. S. 286; 10 S. Ct. 327; Hunt vs. State, 124 Ind. 306; 24 N. E. 887; State vs. Keim, 8 Neb. 63; Wheeling vs. Black, 25 W. Va. 266; Simmons vs. Jackson, 63 Tex. 428.

In Illinois the statute recites that "all fees, perquisites and emoluments" shall be turned into the treasury, and it is held under this statute that sureties upon bonds of public officers are liable for interest earned with public funds.

Hughes vs. People, 82 Ill. 78; Chicago vs. Gage, 95 Ill. 593.

Where the bond recites an obligation to pay over all money received "by virtue of his office" it was held that interest earned upon deposits made contrary to the express provisions of a statute which prohibits an officer from loaning public funds should not be regarded as being received "by virtue of his office," and therefore there could be no recovery for such interest upon the official bond. Renfroe vs. Colquitt, 74 Ga. 618.

The doctrine that a trustee is accountable for interest earned by the trust fund is everywhere conceded.

Barney vs. Saunders, 16 How. 535, *Grier, J.*: "It is a well settled principle of equity, that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the *cestui que trust* for all the gain which he has made. If he uses the trust money in speculations, dangerous though profitable, the risk will be his own, but the profit will inure to the *cestui que trust*."

It is held, however, in a number of carefully considered cases that in the absence of a statute charging the officer with the profits resulting from the use of public funds, that such officer is not liable, and that this rule will be applied even though the law makes it a felony for the officer to use the funds for his own profit.⁸⁵

⁸⁵ State vs. Walsen, 17 Col. 170; 28 Pac. 1119.

The constitution of Colorado provides that "the making of profit, directly or indirectly, out of State, County, City, Town or School district money, or using the same for any purpose not authorized by law, by any public officer, shall be deemed a felony." The State Treasurer deposited the funds in a bank and was paid large sums as interest, which he did not account for to the State, and this action was brought upon his bond to recover the interest so earned with public funds; held—*Hayt, C. J.*: "It is contended by appellant that the state treasurer is a bailee or trustee of the public funds and as such subject to the common law liabilities of trustees. Absolute liability of the treasurer and his sureties for all public moneys received by him as treasurer, is fixed by the state constitution. In this respect the obligation of the treasurer is different from that of an ordinary trustee. Such a trustee is only held to the exercise of reasonable care with reference to the property. If the trust funds are stolen or otherwise lost without fault of the trustee, he is not liable. Not so, however, with the state treasurer. No amount of care will excuse him in case of loss by theft, fire, or by insolvency of the banks selected as depositaries; he must make the loss good to the state. He can only be discharged by paying

over the money when required, and the sureties upon his official bond also assume this unusual liability. The language of our constitution which makes the treasurer absolutely liable, takes away an important right of a trustee. . . . The constitution declares that the making of profit by him, either directly or indirectly, out of public funds, shall be deemed a felony and punished as provided by law. This provision recognizes that a profit may, in fact, be made by the treasurer, although it declares the making thereof a felony to be punished as provided by law. It does not provide that the profit to be made shall enure to the benefit of the state. . . . "It is not claimed that Walsen did not pay over when required all the money collected by him as treasurer. The claim being that he made a profit out of this money and that such profit belonged to the state. The treasurer was not required to loan the principal; if he did put it out and secure interest upon it as charged, or if he had invested it in business and made a profit, although such acts are felonies under our constitution, we are of the opinion that such profit cannot be recovered by the state under the law as it then existed."

The same conclusion was reached in the case of *Commonwealth vs. Godshaw*, 13 Ky. L. Rep. 572; 17 S. W. 737, and the decision is based upon the ground that the relation

§161. Sureties not liable for defaults of principal in not performing his contracts with persons dealing with him in his official capacity.

A liability upon an official bond arises only when the officer fails to perform duties enjoined upon him by law. A contract made by him in his official capacity, and within the scope of his authority, does not bind him personally, but creates a liability against the State or Municipality which he represents,⁸⁸ and a

of debtor and creditor must be deemed to exist between the officer and the State, and since he is absolutely liable on his bond to account for the fund, he may use it as his own. *Shelton vs. State*, 53 Ind. 331.

See also *Egremont vs. Benjamin*, 125 Mass. 15, *Soule, J.*: "It is apparent that the treasurer had not been wont to deposit moneys received by him officially with a bank, to the credit of the town, and to draw, as treasurer, against such deposit; in order to make the payments required of him from time to time, but had simply kept an account between himself and the town, which showed the amount due from him at all times. For that amount he was debtor merely, bound to pay it over whenever it should be called for in due course of business during his term of office, and at the expiration of his term, to pay it to his successor. He was not a bailee of the moneys received, but an accountant, bound to pay over an amount equal to the amount he had received, precisely as a collector of the taxes is a debtor and accountant, bound to pay to the treasurer the moneys which he receives."

Brown vs. State, 78 Ind. 239; *Bocard vs. State*, 79 Ind. 270; *Wil-*

son vs. Wichita Co., 67 Tex. 647; 4 S. W. 67.

⁸⁸ *Hodgson vs. Dexter*, 1 Cranch (C. C.) 109; *Parks vs. Ross*, 11 How. 362, *Grier, J.*: "Now, it is an established rule of law, that an agent who contracts in the name of his principal is not liable to a suit on such contract; much less a public officer, acting for his government. As regards him the rule is, that he is not responsible on any contract he may make in that capacity; and wherever his contract or engagement is connected with a subject fairly within the scope of his authority, it shall be intended to have been made officially, and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable."

See also *People vs. Stephens*, 71 N. Y. 527, *Allen, J.* (560): "When power is necessarily devolved upon a public officer to perform acts for the State, and third persons deal with such officer relying upon his authority and the validity of his acts, there is no reason or principle why the doctrine *qui facit per alium facit per se* should not apply to the extent of binding the State for contracts and payments made by the officer in the discharge of the duties

default in the performance of this contract is a breach by the people and not the officer, although the latter is the instrumentality whereby the breach is brought about. The law does not make it the duty of the public officer to see to it that the State keeps faith with those with whom it contracts, although it imposes upon him the duty of making the contract.

Where a County officer contracts with a publisher for printing official notices and fails to pay, the default is that of the County and not the officer, and the sureties of the latter are not liable.⁸⁷ Even though the costs have been paid into the officer's hands, his sureties are not liable for a failure to disburse in accordance with the contract.⁸⁸

The sureties would be liable for failure to make the contract with the publisher in the first instance, as such duty is specially enjoined upon the officer, but he has no official responsibility to perform the contract.

§162. Sureties upon official bonds are not released by the negligence or misconduct of other officials.

The State or Municipality in accepting a bond for the good conduct of an officer, makes no contract express or implied in reference to the conduct of other officials.

The provisions of the law for the auditing of official accounts make it the duty of those appointed to that service to inspect and settle such accounts, but this is primarily in the interest of the public, and although incidentally it operates for the protection of the sureties, yet the law does not guarantee that such duty will be performed, and the parties to an official bond must

of his office, and within the limits of his authority, and to the same extent that a principal would be bound by the acts of an agent under the same circumstances."

But see *Brown vs. Bradlee*, 156 Mass. 28, where it is held that the selectmen of a town were personally liable for a reward offered for

the apprehension of a criminal, although the offer was made in their official capacity.

⁸⁷ *Brown vs. Phipps*, 14 Miss. 51; *Commonwealth vs. Swope*, 45 Pa. 535.

⁸⁸ *Allen vs. Ramey*, 4 Strob. Law (S. Ca.) 30.

assume the risk that such inspection may not be properly and thoroughly made, or may be omitted altogether.⁸⁹

So also where the statute made it the duty of the treasurer to cause a warrant to be issued against a collector who was in default, and the treasurer neglected to issue such warrant until after the collector had absconded, it was held that such negligence does not release the sureties of the collector, although it was shown that if the warrant had been issued within the time prescribed by law, the amount of the shortage might have been collected from the principal.⁹⁰

§163. Sureties not liable for failure to account for money received by the principal outside the scope of his office.

The doctrine of strict construction in favor of a promisor in suretyship has been often applied in claims upon official bonds

⁸⁹ *Supervisors vs. Otis*, 62 N. Y. 88, *Allen, J.*. "There was no condition, expressed or implied, in the law or in the bond affecting the liability of the appellants as the sureties for Baker, the county treasurer, that the board of supervisors should periodically examine the accounts of the treasurer, or watch over his transactions.

"The sureties are not discharged from their obligation by reason of any neglect or omission of duty by the board of supervisors, or any unfaithfulness or even malfeasance on their part in their dealing with the principal in the bond. The condition of the bond is that the treasurer shall pay, according to law, all moneys that shall come into his hands as such county treasurer, and shall render a full and true account thereof, etc. If this condition has been broken the bond is forfeited, and the sureties are held, notwithstanding the board of supervisors or other agents of the county may have been wanting in the performance of some duty imposed upon

them, or have been negligent and careless in the performance of such duty. . . . The law, while it imposes upon the supervisors the duty of examining the accounts of county treasurers, does not guarantee to the sureties the performance of that duty, or make the omission or negligent performance of it available to the sureties as a release from their obligation, or a defense to an action upon the bond of their suretyship."

Hart vs. United States, 95 U. S. 316; *Farmington vs. Stanley*, 60 Me. 472; *Campbell vs. People*, 154 Ill. 595; 39 N. E. 578.

⁹⁰ *Looney vs. Hughes*, 26 N. Y. 514.

Where a public officer has the power, and is charged with the duty of removing from office subordinates who are in default, and fails to discharge a known delinquent, it is held that the sureties of the delinquent are not released for subsequent defalcations. *Stern vs. People*, 102 Ill. 540.

where the default complained of was an act outside of the scope of the duty of the officer.

The bond by its terms secures the due performance of the duties enjoined by law upon the officer, and generally specifies no other duties.

The failure by an officer to do any acts which the law does not require him to do, or a voluntary doing of unauthorized acts in an improper manner, can not create a liability against the sureties of the bond, except upon the theory that persons in an official position ought to be charged with the consequence of all acts done under color of their office, and that the terms of the bond should be extended by implication to cover all misconduct which purports to be official.

A clerk of the court and his sureties are liable as insurers upon the officer's official bond for moneys received by him by virtue of his office, and they are not relieved from liability for the loss of the money though without the officers' negligence or default. Under an order of court requiring the clerk to accept a certain sum of money tendered by the defendants in a pending suit and hold the same until the further order of the court the clerk receives such money in his official capacity, and he and his bondsmen are liable for the loss of the money by the failure of the bank in which the clerk deposited it.^{90a}

It was held where a collector of taxes gave bond conditioned for the faithful discharge of his duties as "collector for the village" and who collected all taxes assessed upon the property in the village, including the State, County and Township taxes, that the collection of taxes for other than village purposes was outside of the scope of his official duties as "collector for the village," and that the sureties were not liable for a failure by the collector to pay over that part of the tax levied upon the village property for State, County and Township uses.⁹¹

^{90a} *People vs. McGrath*, 279 Ill. 550; 117 N. E. 74.

⁹¹ *Ward vs. Stahl*, 81 N. Y. 406; *Butte vs. Bennetts*, 51 Mont. 27; 149 Pac. 92; Ann. Cas. 1918C, note.

So also where a clerk of the court received money paid into court, which the statute does not authorize or require him to receive, and receipts for it as clerk, the act not being within the scope of his official duty, his sureties are not liable for his conversion of the funds.⁹²

The same principle has been applied, but upon doubtful reasoning, where a debtor against whom judgment has been rendered, voluntarily pays the judgment to the sheriff, in anticipation of an execution, but without any writ being in fact issued, it was held that the receipt of the money by the sheriff was not within the scope of his duty, and his sureties were not chargeable.⁹³

The embezzlement of school funds collected by the County Auditor — there being no authority conferred upon the Auditor to make such collections — was considered not to create a liability against his sureties.⁹⁴

The lack of authority must, however, be jurisdictional in order to be within the rule under discussion. It is within the duty of the officer to act upon the terms of the law, even though the law be unconstitutional, or the authority conferred is invalid for any other reason.

Where the rate of taxation is in excess of that authorized by law, a treasurer in collecting such taxes is nevertheless acting within the scope of his duty, and his sureties will be liable for his failure to account for such excess taxes.⁹⁵

Even though the officer acts in pursuance of a direct au-

⁹²*Carey vs. State*, 34 Ind. 105; *Bowers vs. Fleming*, 67 Ind. 541; *Hardin vs. Carrico*, 3 Met. (Ky.) 289; *Wilson vs. State*, 67 Kan. 44; 72 Pac. 517; *State vs. Porter*, 69 Neb. 203; 95 N. W. 769; *Clark vs. Logan County*, 128 S. W. 1079; 138 Ky. 676.

⁹³*Mills vs. Allen*, 7 Jones Law (N. C.) 564. In this case the debtor having paid the amount of the judgment to the Sheriff, without any writ being issued, was afterwards required to pay the amount again upon a writ regularly issued. And this action was brought by the debtor against the Sheriff and his

sureties to recover back the amount first paid, and it was held that the sureties were not liable.

⁹⁴*State vs. Bonner*, 72 Mo. 387. See also *State vs. Griffith*, 74 O. S. 80; 77 N. E. 636.

⁹⁵*Feigert vs. State*, 31 O. S. 432; *Morris vs. State*, 47 Tex. 583; *Chandler vs. State*, 1 Lea (Tenn.) 296; *Bullwinkle vs. Guttenberg*, 17 Wis. 583.

Sutherland vs. Carr, 85 N. Y. 105. *Folger, C. J.*: "There was doubtless in this case more money raised out of the town than was actually needed for the purposes of the town. It was raised in pursuance of law.

thority from his superior officer, yet if the duty thus imposed is not within the scope of his regular official duty, his defaults are not covered by his bond.⁹⁶

Where an officer borrows money in his official capacity without authority, and afterwards fails to account for it, his sureties are not liable.⁹⁷

The law either prescribes exactly the duties of an officer, or delegates the authority to regulate such duty to a person appointed or elected for that purpose. The opportunity for covering all emergencies affecting public rights is broad enough to avoid any necessity for creating suretyship obligations by implication, and there is great uniformity in the precedents fixing the rule in this respect.⁹⁸

§164. Liability upon bond of sheriff or constable for trespass and other wrongs committed colore officii.

If an officer pretends to have an official right to do an act, but in fact has no such right, and yet acts upon such pretence,

It belonged to the town. It was not required by any law to be paid elsewhere. . . . Being money belonging to the town and raised under a law that looked to the vesting of it in the hands of the supervisor of the town, it was properly paid to him. He was accountable for it. The law was in effect before his bond was given. His bond is for that money. He and his sureties must therefore replace that which he has not paid over to his successors or other officers of the town."

⁹⁶ United States vs. Adams, 24 Fed. Rep. 348.

In this case a collector of customs was directed by the Assistant Secretary of the Treasury to convey a large quantity of gold to San Francisco. In complying with this order he lost some of the gold by theft, and the Court held his sureties not

to be liable, since the transportation of the money was not a part of his duty as collector.

⁹⁷ Leigh vs. Taylor, 7 Barn. & Cr. 491.

⁹⁸ People vs. Cobb, 10 Col. App. 478; State vs. Moore, 56 Neb. 82; 76 N. W. 474; Dewey vs. Kavanaugh, 45 Neb. 233; 63 N. W. 396; Waters vs. Melson, 112 N. C. 89; 16 S. E. 918; U. S. vs. Morgan, 28 Fed. Rep. 48; People vs. Hilton, 36 Fed. Rep. 172; Heidenheimer vs. Brent, 59 Tex. 533; San Luis Obispo Co. vs. Farnum, 108 Cal. 567; 41 Pac. 447; Orton vs. Lincoln, 156 Ill. 499; 41 N. E. 160; Lowe vs. City of Guthrie, 4 Okl. 287; 44 Pac. 198; Webb vs. Anspach, 3 O. S. 522; Cheboygan vs. Erratt, 110 Mich. 156; 67 N. W. 1117.

his conduct is termed *colore officii*.⁹⁹ And if, under color of his office, he commits a wrong, and violates the right of another, he is personally liable, and by the preponderance of authority his sureties are liable also.

Thus where an officer levies execution or attachment upon the property of a stranger to the writ, his sureties will be liable.¹⁰⁰

This view is based upon the argument that bonds of sheriffs and others, charged with the duty of serving judicial process,

⁹⁹ "*Colore officii*" is used as a description of an act of a public officer done with wrongful intent; as a technical expression, it implies bad faith and breach of duty.

Chamberlain vs. Beller, 18 N. Y. 115.

It has been said that the term "is always taken *in malam partem*, and signifies an act badly done, under the countenance of an office, and it bears a dissembling visage of duty and is properly called extortion." A more modified use of the term has grown up, and it has come also to be applied to those acts of public officers which are in fact unlawful, but which the officer in good faith supposed to be lawful, such as acting upon a void writ, which he supposed was valid, or committing a trespass by levying execution upon property of a stranger to the writ, which he supposed belonged to the debtor.

¹⁰⁰ Ohio vs. Jennings, 4 O. S. 419.

Thurman, C. J.: "The authorities seem to us quite conclusive, that a seizure of the goods of A under color of process against B is *official misconduct* in the officer making the seizure; and is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is, that the trespass is not the act of a mere individual, but is perpetrated *colore*

officii. If an officer, under the color of a fi. fa. seize property of the debtor that is exempt from execution, no one, I imagine, would deny that he had thereby broken the condition of his bond. Why should the law be different if, under color of the same process, he takes the goods of a third person? If the exemption of the goods from the execution in the one case, makes their seizure official misconduct, why should it not have the like effect in the other? True, it may be sometimes more difficult to ascertain the ownership of goods, than to know whether a particular piece of property is exempt from execution; but this is not always the case, and if it were, it would not justify us in restricting to litigants, the indemnity afforded by the official bond, thus leaving the rest of the community with no other indemnity against official misconduct than the responsibility the official might furnish."

People vs. Schuyler, 4 N. Y. 173, Gardiner, J.: "His sureties undertook 'that he should faithfully execute' the process. If he had 'in all things' performed his duty, he would have seized goods of 'F' or returned the writ, instead of which he levied upon the goods of 'B,' as the property of the defendant in attachment.

"Upon principle, and upon the

would be of no value, if in every case where action is brought on such bonds, it must be shown that the act complained of is legal and lawful, and that the statement of these facts as a condition of recovery would in general defeat recovery. Also that, where the officer by reason of his official position does acts which he could not do as a private person, which, however, he had no authority to do as an officer, he violates his duty as an official and his sureties must respond in damages.

grounds of public policy, it seems to me that the responsibility of his sureties should be different from those they would incur, if the sheriff had entered upon the premises of the relator, and removed his goods without any process whatever.

"In the last case supposed, the sheriff would act in his own right, and might be resisted as any other wrongdoer. In the one before us, he was put in motion by legal authority, invoked on behalf of others, and could command the power of the county to aid him in its execution.

"Respect for the process of our courts, and for the official character of the sheriff, if it did not forbid forcible opposition (which must have been unavailing), is incompatible with the notion of making resistance indispensable as a means of protection. This must be the alternative, if those who are thus aggrieved are driven to rely exclusively upon the responsibility of the officer, who, as in this case, may be wholly insolvent."

Pratt, J. (dissenting): "The authorities recognize a principle or rule by which the acts of the sheriff, for which his sureties may be held liable, can be distinguished from those acts for which they will not be held liable. The former are termed acts done *virtute officii*, and the latter *colore officii*. The distinction is

this: Acts done *virtute officii* are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature, that his office gives him no authority to do them. This distinction is as old as the common law, and has been acted upon and recognized in numerous cases. .

. . It is insisted that the duty rested upon the sheriff in this case to seize the property of the defendant in execution or to return the writ. But the difficulty in this argument is that the sheriff was not made liable for not seizing the goods of Fay, but for seizing the goods of the relator. The relator has no right of action against the sheriff or anybody else for this neglect. The plaintiff in attachment is the only man who has any interest in that matter. . . . But it is insisted that public policy requires that the sureties should be made liable; that the rights of third persons would be otherwise unsafe, because they could not successfully resist the sheriff, he having the power of the county at his command. . . . But I cannot appreciate the supposed difficulty. It is quite clear that if the sheriff should attempt to seize the property of the

The same rule is held to apply where the officer levies upon and sells property exempt from execution.¹⁰¹

If an officer in making an arrest uses unnecessary force and violence,¹⁰² or in order to prevent the escape of a prisoner

wrong man, the latter would have the right to resist force with force, and having the right with him there can be no reason why he should not be successful. The claimant would thereby have the advantage, as he could protect those who might assist him, whereas those who might assist the sheriff would be trespassers."

See also *Cumming vs. Brown*, 43 N. Y. 514; *Lammon vs. Feusier*, 111 U. S. 17; 4 S. Ct. 286; *State vs. Fitzpatrick*, 64 Mo. 185; *Greenfield vs. Wilson*, 13 Gray 384; *Turner vs. Sisson*, 137 Mass. 191. "The object of the bond is to make the sureties responsible for the due performance of his official acts in the service of process, and in his other duties. By official act is not meant a lawful act of the officer in the service of process; if so, the sureties would never be responsible; it means any act done by the officer in his official capacity, under color and by virtue of his office." *Greenberg vs. People*, 225 Ill. 174; 80 N. E. 100.

Comm. vs. Stockton, 5 T. B. Mon. (Ky.) 192; *Charles vs. Haskins*, 11 Ia. 329; *Turner vs. Killian*, 12 Neb. 580; 12 N. W. 101; *Thomas vs. Markmann*, 43 Neb. 823; 62 N. W. 206; *Holliman vs. Carroll*, 27 Tex. 23; *Van Pelt vs. Littler*, 14 Cal. 194.

¹⁰¹ *Casper vs. People*, 6 Ill. App. 28; *Hursey vs. Marty*, 61 Minn. 430; 63 N. W. 1090; *State vs. Farmer*, 21 Mo. 160; *Strunk vs. Ochle-tree*, 11 Ia. 158; *Hobbs vs. Barefoot*, 104 N. C. 224; 10 S. E. 170.

¹⁰² *Drolesbaugh vs. Hill*, 64 O. S.

257; 60 N. E. 202. In this case a marshal arrested the plaintiff without any warrant or process of Court, and dragged him along the street, assaulted him, and put him in prison, and the contention of the sureties was, that it was not official misconduct, but merely an assault and battery, for which the officer was liable only in his individual capacity, but the sureties were held liable.

Minshall, C. J.: "It would seem that the public have as much interest, if not more, in the duty of an officer not to colorably exercise the powers with which he is clothed, as not to use unnecessary violence, where he is otherwise clearly within the duties of his office. It is by virtue of the office he holds that he may exercise its duties to the injury of another. It is not probable that any individual, not an officer, would have attempted to do what the marshal is charged with doing." *Riley vs. Walker*, 42 W. L. B. 275 (Ohio); affirmed 60 O. S. 626; 54 N. E. 1108.

Risher vs. Meehan, 11 O. C. C. 403, *Laubie, J.*: "The real question in all such cases is, was the particular act complained of unlawful, and done while engaged in, and in connection with, the performance of an official duty? Not merely, was such act illegal, or forbidden by law? If it was done in the attempt to perform an official duty, then it was official misconduct, and we know of no principle of law which should intervene to protect the sure-

charged with misdemeanor unlawfully shoots him, his sureties are liable.¹⁰³ Again where an officer while serving a writ of replevin made an unlawful entry into a house and committed acts of violence, whereby persons in the house were seriously injured, it was held to create a liability against the sureties upon the bond of the officer.¹⁰⁴ If the officer is acting upon a void writ, or falsely represents he has a writ, when in fact he has none, and takes property which is turned out to him in reliance upon his representations, he is a mere trespasser, and no recovery can be had upon his bond.¹⁰⁵

ties upon the bond; and public policy requires that they should be held responsible. . . . The bond is required, and is given, for the express purpose of securing the public against illegal, unwarranted and unlawful acts of the officer while in the discharge of official duty. . . . It is, therefore, entirely immaterial to consider whether the act in question would come within the definition of an act done *colore officii*, or an act done under performance of a duty *virtute officii*; whether it was a malfeasance or misfeasance, intentional or unintentional. All that is quite immaterial, if we find that the officer at the time engaged in the performance of an official duty, and he improperly performed it, or unlawfully performed it to the injury of another."

To the same effect see *Clancy vs. Kenworthy*, 74 Ia. 740; 35 N. W. 427. "If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he can not be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in the discharge of his duty, he of course is not liable. It follows that, if defendant's position be sound, no action can be maintained on the bond in any case." See *Greenius vs. American Surety Co.*, 92 Wash. 401; 159 Pac. 384; *L. R. A.* 1917F, 1134.

Cash vs. People, 32 Ill. App. 250; *Huffman vs. Koppelkom*, 8 Neb. 344; *Hall vs. Tierney*, 89 Minn. 407; 95 N. W. 219; *Lee vs. Charmley*, 129 N. W. 448; 20 N. D. 570; *McClenny vs. Inverarity*, 80 Kan. 569; 103 Pac. 82.

But see *Forest County vs. United Surety Co.*, 149 Wis. 323; 136 N. W. 335; *Jones vs. Lucas Co. Commissioners*, 57 O. S. 189; 48 N. E. 882.

¹⁰³ *Brown vs. Weaver*, 76 Miss. 7; 23 South. 388.

See also *Stephenson vs. Sinclair*, 14 Tex. Civ. App. 133; 36 S. W. 137. In this case the officer fired on the escaping prisoner and killed the horse on which the prisoner was mounted, and it was held that although the shooting was unlawful, the sureties on the bond of the officer were liable in damages for the value of the horse.

¹⁰⁴ *State vs. Beckner*, 132 Ind. 371; 31 N. E. 950.

¹⁰⁵ *Turner vs. Collier*, 4 Heisk. (Tenn.) 89; *McLendon vs. State*, 92 Tenn. 520; 22 S. W. 200; *Cornell vs. People*, 37 Ill. App. 490; *Gerber vs. Ackley*, 32 Wis. 233; *State vs. McDonough*, 9 Mo. App. 63.

Governor vs. Pearce, 31 Ala. 465. But the rule in Alabama is now modified by Statute, and the sureties of an officer are liable for damages resulting from the service of a void process. (*Ala. Rev. Code*, Sec. 3087).

§165. View that sureties are not liable for wrongs of sheriff or constable committed *colore officii*.

The doctrine is announced in some cases that where an officer does that which he has no power to do, as when he acts outside the scope of his authority, he is a mere trespasser and his acts cannot properly be termed *official* misconduct, but rather *unofficial* or *individual* misconduct.

That a writ of execution or attachment gives him authority to levy upon the property of the debtor named in the writ, but it gives him no color of authority to seize the property of a stranger to the writ.

It is urged that the Bond is to protect the parties in interest against damages resulting from a failure to obey the commands of the writ, and from the consequences of levying upon the defendant's property in an improper manner or the doing of some irregular or unlawful thing in connection with the seizure of the defendant's property, but that it does not cover, either by its terms, or by necessary implication, any acts of the officer which are not official, in the sense that he is authorized to do them either by law or the special commands recited in a judicial process, and that there is no more reason for holding the sureties liable for damages resulting from a levy upon the property of a person not named in the writ, an act which is wholly unauthorized, than there would be for holding them liable for loss resulting from a burglary committed by the officer.

A leading case of this class states the view that "official acts are those which are done by virtue of the office; such as, if properly done, exculpate both the officer and his sureties from responsibility, but which, if neglected or improperly done, render both liable. If the authority is exceeded, or the duty omitted, an action may be maintained against the officer in his

Albright vs. Mills, 86 Ala. 324;
5 South. 591.

See also Barnes vs. Whitaker, 45
Wis. 204.

Contra—Tieman vs. Haw, 49 Ia.
312.

For authorities maintaining the
view that sureties upon an official
bond are not liable for acts done
colore officii, see Post Sec. 182.

official capacity, and his sureties held responsible for it. Unofficial acts are such as are committed under color of the office, such as can not be lawfully done, and can not be justified by the official character of the sheriff, or by any process in his hands." 108

§166. Liability for loss of public money by failure of the bank used as public depository.

The decided weight of authority in this Country both in State and Federal Courts is that officials having the custody of a public fund are liable for its loss even though the loss occurs without their fault or negligence.

The most extreme application of this rule is where the officer acting in good faith, and exercising care in selection of a depository, places the fund in a solvent bank which thereafter fails.

The discussion as to whether the officer and his sureties must respond to the loss thus occasioned has taken a wide range,

108 State vs. Conover, 28 N. J. L. 224; Chandler vs. Rutherford, 101 Fed. 774; Inman vs. Sherrill, 116 Pac. 426; 29 Okl. 100; State vs. Mankin, 70 S. E. 764; 68 W. Va. 772.

See also Stockwell vs. Robinson, 9 Houst. (Del.) 313; 32 Atl. 528; State vs. Brown, 54 Md. 318.

"The condition of the bond is, *'That he shall well and faithfully execute the office of constable.'* By this contract, the sureties guarantee the public against official delinquency on the part of the officer. For any breach of official duty his bond is responsible; this is the extent of liability assumed by the sureties. If he commits a wrong, not in the discharge of his official duty, he is personally liable, but his sureties cannot be held responsible therefor; it is not within the terms of their contract." State vs. Brown, 11 Ired. (N. C.) 141.

It was held in *People vs. Lucas*.

93 N. Y. 585, that the wrongful seizure and sale by the constable of the property of A on an execution against B is a mere trespass although under color of process, and does not constitute a breach of the condition of a bond which recites that he will pay to the person entitled thereto "all such sums of money as the constable may become liable to pay on account of any execution." This case rests upon the special and limited language of the bond, and the earlier rule in this State as stated in *People vs. Schuyler*, 4 N. Y. 173, is not disturbed, wherein it was held, the sureties upon a bond conditioned that the principal should faithfully perform his duty are not liable for acts done *colore officii*.

See Ante Sec. 181 for authorities supporting the view that the sureties upon an official bond are liable for all acts done under color of office whether authorized or not.

sometimes turning on the special form of the Bond, again on the wording of the statute, and often altogether on the principles of public policy.

A forcible argument against the doctrine of absolute liability is made in many cases, and in favor of the limited responsibility of a bailee or trustee where the officer acts in good faith and without negligence.

The rule of common law does not hold a trustee liable for loss of trust funds except upon proof of neglect or misconduct,¹⁰⁷ and it is urged that no public necessity exists for holding an officer to a more stringent liability in the absence of statutory requirement, and that the official Bond is not intended to add anything to the liability of the officer, but merely to furnish a security for the due performance of the obligation imposed at common law upon a trustee, which is always satisfied when the conduct of the trustee is fair, diligent and cautious, and that public safety requires that the large accumulation of money incident to official duty should be deposited in a bank, and that a failure to so deposit would be gross negligence,¹⁰⁸ and that the people and not the officer should assume the risk of such future insolvency of the depository as could not with due diligence be foreseen.

In this connection it has been said: "We believe the true rule is that a public officer who receives money by virtue of

¹⁰⁷ Such is the rule as to executors and administrators. *Norwood vs. Harness*, 98 Ind. 134; *State vs. Meagher*, 44 Mo. 356; *Moore vs. Eure*, 101 N. C. 11; 7 S. E. 471; *Lehman vs. Robertson*, 84 Ala. 489; 4 South. 728; *Newton vs. Bushong*, 22 Gratt. 628.

The same rule applies as to receivers. *Barton vs. Ridgeway*, 92 Va. 163; 23 S. E. 226; *Powers vs. Loughridge*, 38 N. J. Eq. 396.

In *Fahnestock's Appeal*, 104 Pa. 46, it was said, adopting and quoting from *Eyster's Appeal*, 4 Harris 372: "If guardians and trustees are to be held responsible for all

negligence, and are not allowed the exercise of a reasonable discretion and prudential care in the management of their trusts, it will deter prudent men from assuming the office, which in itself is sufficiently onerous and already undertaken by such men with reluctance."

See also *Law's Estate*, 144 Pa. 499; 22 Atl. 831; *O'Connor vs. Decker*, 95 Wis. 202; 70 N. W. 286.

¹⁰⁸ In some instances trustees have been held liable for the loss of trust funds on the grounds that they were negligent in failing to deposit the funds in bank. *Foster vs. Davis*, 46 Mo. 268.

his office is a bailee, and that the extent of his obligation is that imposed by law; that when unaffected by constitutional or legislative provisions his duty and liability are measured by the law of bailment. If a more stringent obligation is desired it must be prescribed by statute. That his official Bond does not extend such obligation, but its office is to secure the faithful and prompt performance of his legal duties." ¹⁰⁹

In spite, however, of the apparent justice of these holdings, and the seeming hardship of the opposing view, the doctrine which has met with the most general acceptance is that the loss of public money by a bank failure will not constitute an exoneration of the official bond, even though no suitable and safe place of deposit was provided by law, and the officer was not negligent in selecting the bank. ¹¹⁰

¹⁰⁹ *Wilson vs. People*, 19 Colo. 199; 34 Pac. 944. In this case the Court, commenting on the facts, said: "From the agreed facts it appears that the money was lost through no fault of the clerk. He deposited the money in a bank of reputed solvency, as clerk of the court, and in doing so, acted as prudent men ordinarily do with their own funds."

See also *State vs. Copeland*, 96 Tenn. 296; 34 S. W. 427, *Wilkes, J.*: "If a public officer is held to be an insurer against loss when he exercises the utmost diligence, caution and good faith, it will result that no man of any financial standing or business prudence would accept a public trust which involves the handling of public money. There would be but little inducement to act honestly and in good faith, since neither would avail against an unforeseen and unavoidable casualty. . . . The measure of the trustee's liability is fixed by the laws relating to his office, and not merely by the terms of the bond, and there is no unconditional obligation to pay under any and every contingency. The primary object and purpose of

this bond is not to fix or define the limit of his liability, but to super-add to his personal responsibility the security of his bondsmen, and the liability of both principal and sureties under the bond is fixed by the laws relating thereto."

¹¹⁰ *Tillinghast vs. Merrill*, 151 N. Y. 135; 45 N. E. 375; *Fairechild vs. Hodges*, 14 Wash. 117; 44 Pac. 125; *State vs. Moore*, 74 Mo. 413; *Omro Supervisors vs. Kaine*, 39 Wis. 468; *Havens vs. Lathene*, 75 N. C. 505; *Inglis vs. State*, 61 Ind. 212; *Rose vs. Douglass Tp.*, 52 Kan. 451; 34 Pac. 1046; *Griffin vs. Levee Comrs.* 71 Miss. 767; 15 South. 107; *Nason vs. Poor Directors*, 126 Pa. 445; 17 Atl. 616; *State vs. Hill*, 47 Neb. 456; 66 N. W. 541; *Lowry vs. Polk County*, 51 Iowa 50; 49 N. W. 1049; *Perley vs. Muskegon Co.*, 32 Mich. 132; *Board of Education vs. Jewell*, 44 Minn. 427; 46 N. W. 914; *Wilson vs. Wichita Co.*, 67 Tex. 647; 4 S. W. 67; *State vs. Nevin*, 19 Nev. 162; 7 Pac. 650; *Estate of Ramsay vs. People*, 197 Ill. 572; 64 N. E. 549; *Mecklenburg County vs. Beales*, 111 Va. 691; 69 S. E. 1032; 36 L. R. A. (N.S.) 285; *People vs. McGrath*, 279 Ill. 550; 117 N. E. 74.

Where the statute makes it the

The doctrine of absolute liability does not depend upon the hypothesis that the officer is a debtor, and the owner of the fund, but rather that he is a special bailee, and that public policy requires the officer to assume the risks incident to the custody of large sums of money, and that any other rule must inevitably lead to the perpetration of great fraud, by making it possible for combinations between officials and depositaries resulting in unlawful conversions for which there could be no civil redress.

The measure of duty imposed by this public policy, and by the necessity for full protection, is greater than need be applied in a mere trust or ordinary bailment for hire.

The view has been expressed in at least one reported case that the liability upon the sureties is to be determined wholly from the language of the Bond, and the statute prescribing the duties of the officer, and not upon any construction founded upon public policy, and that if the statute requires the officer to "receive and keep all moneys" and the Bond provides that the officer will "justly account for all moneys coming into his hands" that the law will not extend the strict and literal meaning of this language, and that the undoubted meaning of the words, "justly account," is an accounting according to law, and if the law requires him to "keep" the funds, but does not in terms require the officer to keep them "safely," that a court has no right to impose an absolute responsibility upon the Bond by implying the word "safely."¹¹¹

duty of the officer to deposit the public funds in a bank, it is held that the officer is not liable upon his bond for loss resulting from the insolvency of the bank, if he uses due care in selecting the depository. *City of Livingston vs. Woods*, 20 Mont. 91; 49 Pac. 437.

¹¹¹ *State vs. Gramm*, 7 Wyo. 329; 52 Pac. 533, *Potter, Ch. J.*: "It is observable that the statute does not expressly state that the treasurer shall keep "safely" the public

funds. That word "safely" which has cut so important a figure in the majority of the cases is absent from our statute. Does the requirement that he shall receive and keep, mean, intrinsically, as used in the section, the same as "keep safely"? . . . The Court has no sort of authority to make a contract between the State and these defendants. The contract, whatever it is, has already been made. The Court has no right to impose upon the defendants any

§167. Liability for loss of public money by theft or robbery.

An early authoritative case defining the liability upon an official Bond where the public funds were feloniously stolen,

higher degree of responsibility than the legislature has done, and by their bond they have assumed. If by the intrinsic purport of the statute, the duty is not imposed upon the treasurer to keep safely the public funds, without exception, it would exceed the judicial prerogative to force such duty upon him. The duty of the Court is merely to construe and interpret the statutes, and not to make them. . . . The conviction is forced upon us that the duty imposed upon the treasurer by statute and all reasonable implications therefrom was that he should have the custody of the money of the State and should exercise a diligent and prudent care over the money, but in a high degree, and should also bring to the performance of such duty strict fidelity and faithfulness. And it therefore follows that by the bond neither the treasurer nor his sureties undertook any greater responsibility for the reason that they contracted that the treasurer should justly and truly account for the public moneys, which accounting we hold means according to law."

Corn, J., (dissenting): "Some stress is laid upon the circumstance that while some statutes, under which the treasurer has been held to strict liability, provide that he shall 'safely keep,' the word safely is omitted from ours, and it is argued that the latter indicates requirement of a smaller degree of responsibility. . . . In Iowa township treasurers are required by the statute to give

bond 'conditioned for the faithful performance of their duties.' The same act makes it the duty of the treasurer to hold all moneys belonging to the district."

Commenting upon the case of *District of Taylor vs. Morton*, 37 Iowa 553, construing the Iowa statute the dissenting opinion continues—"The Court did not recognize the nice distinction relied upon in the majority opinion in this case, that to 'hold safely' might be construed as a contract to hold without loss, while the obligation to 'hold' is to be shaded down into a contract to use due care and diligence in holding. But it pointedly rejects such interpretation of the requirement to hold the money, although, as in our own statute, the word is entirely unqualified by safely, securely, or any word of like import. . . . While there are several cases wherein the statute or the bond sued on employed the expression 'safely keep' or 'keep safely,' there is, as I believe, no reported case sustaining the distinction which seems to be relied upon by the majority of the court for the decision of this case. This view has been frequently insisted upon by counsel, but so far as the cases have come to my knowledge, has in every instance been rejected by the courts."

In Kansas the statute requires the officer to "receive and take charge" of the funds without any qualifications as to "safely" keeping, held in *Rose vs. Douglass Tp.*, 52 Kan. 452; 34 Pac. 1046. "By accepting

without fault or negligence on the part of the officer, held that "public policy requires that every depositary of the public money should be held to strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open the door to frauds, which might be practised with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of customs, receivers of public moneys, and others who receive more or less of the public funds, and what losses might not be anticipated by the public? . . . As every depositary receives the office with a full knowledge of its responsibilities, he can not, in case of loss, complain of hardship. He must stand by his bond and meet the hazards which he voluntarily incurs." ¹¹²

This holding by the highest tribunal in the land exercised great influence upon the courts for many years.¹¹³ It has not, however, always been followed by the more recent decisions.¹¹⁴

the office of township treasurer McN. assumed the duty of receiving and safely keeping the money of the township and paying it out according to law. He or his sureties are bound to make good any deficiency which might occur in the funds which come under his charge, whether they were lost in the bank or otherwise."

¹¹² United States vs. Prescott, 3 How. 578.

¹¹³ United States vs. Morgan, 11 How. 154; United States vs. Dashiell, 4 Wall. 182; Boyden vs. United States, 13 Wall. 17; United States vs. Jones, 36 Fed. Rep. 759; State vs. Harper, 6 O. S. 608; Halbert vs. State, 22 Ind. 125; Morbeck vs. State, 28 Ind. 86; Muzzy vs. Shattuck, 1 Denio (N. Y.) 233; Comm. vs. Comly, 3 Pa. 372; Han-

cock vs. Hazzard, 12 Cush. 112; District of Taylor vs. Morton, 37 Iowa 550; Union Township vs. Smith, 39 Iowa 9; Redwood Co. vs. Tower, 28 Minn. 45; 8 N. W. 907; State vs. Lanier, 31 La. Ann. 423.

¹¹⁴ State vs. Houston, 78 Ala. 576; Cumberland vs. Pennell, 69 Me. 357; Healdsburg vs. Mulligan, 113 Cal. 205; 45 Pac. 337.

There has been much comment by the courts and legal writers upon the case of United States vs. Thomas, 15 Wall. 337, and the conclusion generally reached is that in this case the Federal Supreme Court abandons the extreme view taken in United States vs. Prescott, *ubi supra*. The United States sued Thomas and his sureties upon his bond as surveyor of the customs at Nashville. The bond was in the

The doctrine that loss resulting from irresistible superhuman force, such as a public enemy or by the act of God, will not be chargeable either to the officer or to his sureties, may now be de-

usual form and conditioned for the faithful discharge of the duties of the office. The officer was charged with a shortage and pleaded in defense that the moneys were seized by the authorities of the Confederate States against his will and consent, and by the exercise of military force, which he was unable to resist, and the question presented to the Court was whether the sureties were liable for the loss of public funds through seizure by an enemy of the government, and it was held that the sureties was not liable, and the distinction is made between loss by robbery and theft and that which results from an overruling force of a public enemy. "That overruling force arising from inevitable necessity, or the act of a public enemy, is a sufficient answer for the loss of public property when the question is considered in reference to an officer's obligation arising merely from his appointment, and aside from such a bond as exists in this case, seems almost self-evident."

In reference to the liability upon the bond as a special contract creating obligations in addition to those imposed by the law the learned Justice continues: "We do not question the doctrine so strongly urged by the counsel for the government, that performance of an express contract is not excused by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and though beyond his control—with the qualification, however, that the thing to be done does not become physically impossible. . . . It is contended that

the bond, in this case, has the effect of such a special contract, and several cases of action on official bonds have been cited to support the proposition. Those principally relied on are the cases of the *United States vs. Prescott* and the recent cases of *Dashiel*, *Keebler*, and *Boyden* in this court. It must be conceded that the language used by the court, not only in the case already referred to, but in some of the other cases cited, seems to favor the rule contended for. *But in none of them was the defense of overruling necessity interposed.* They were all cases of alleged theft, or robbery, or some other cause of loss, which would have been insufficient to exonerate a common carrier from liability. They all concur in establishing one point, however, of much importance, that a bond with an unqualified condition to account for and pay over public moneys enlarges the implied obligation of the receiving officer, and deprives him of defenses which are available to an ordinary bailee; but they do not go to the length of deciding that he thereby becomes liable at all events; although expressions looking in that direction, but not called for by the judgment may have been used." Several members of the court while agreeing that the sureties should be exonerated, dissent on the ground that the case of the *United States vs. Prescott*, and other cases cited, should have been expressly overruled.

Miller, J. (dissenting): "I do not believe now that on sound principle the bond should be construed to extend the obligation of the de-

duced from all the more recent cases as the prevailing rule both in the State and Federal Court. Such causes are considered as excluding all possibility of fraud or collusion with the officer.

The distinction in principle, however, is not easily apparent, between an irresistible force applied by a public enemy in time of war, and a similar force applied by a highway robbery in time of peace. In both cases the officer is entirely without fault or negligence, and where collusion does not exist, is in each case upon exactly the same footing, and public policy does not generally require a party to be charged with the consequences of fraud merely because he is in a situation where he might have committed fraud.

In at least one court the doctrine of absolute liability is applied even though loss results from an act of a public enemy or an act of God.¹¹⁵

§168. Liability against judicial officers acting without jurisdiction.

A judicial officer acts without jurisdiction in undertaking to exercise judicial powers in matters wherein the law has not clothed him with authority to act.

All acts of such officer which are not within the power conferred by law, and which are performed without jurisdiction either as to the subject matter or the person, are not merely erroneous but absolutely void, and if such acts result in damage to the party affected, the officer is individually liable, and his bond secures the performance of this liability. Such wrong-

positary beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of a receiver, if no bond had been given; the object of taking the bond being to obtain sureties for the performance of that obligation. Nor do I believe that prior to these decisions there was any princi-

ple of public policy recognized by the courts, or imposed by the law, which made the depository of the public money liable for it, when it had been lost or destroyed without any fault of negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safe keeping."

¹¹⁵ State vs. Clark, 73 N. C. 255.

See also Thompson vs. Board, 30 Ill. 99.

ful invasion of the rights of another constitutes a judicial officer a legal trespasser.

Thus where a Justice of the Peace without authority of law issues a warrant of arrest, he is liable to an action in damages at the suit of the party illegally arrested.¹¹⁶

Also where a magistrate assumes without jurisdiction to try an action for assault and battery¹¹⁷ or to enforce a process founded upon a judgment or sentence in a case where no jurisdiction is acquired.¹¹⁸

It is held that by imposing a sentence of imprisonment where the law only gives the authority to impose a fine a magistrate is liable in damages, in case the sentence is executed.¹¹⁹

Generally, however, no liability attaches to a judicial officer for acting in excess of jurisdiction. If the Court has jurisdiction of the person and the property affected, and his order or decree exceeds in extent that which he is authorized to make, it constitutes a judicial error and not a trespass, and the remedy is in review and not in damages.

A Judge of the United States Circuit Court presiding at the trial of a person indicted for embezzlement in the postal service fined the prisoner \$200.00 and sentenced him to imprisonment for one year. The penalty affixed by Congress for the offense was a fine of \$200.00 *or* imprisonment for one year.

Such judicial proceedings were thereafter had in the Supreme Court of the United States as resulted in the discharge of the defendant from custody, and action was brought against the Judge to recover damages for false imprisonment and it was held "the case turns upon a question more easily stated than it is determined: Was the act of the defendant done as a judge? Our best reflection upon it, aided by the reasonings and conclusions of many more cases than we have cited, has brought us

¹¹⁶ Truesdell vs. Combs, 33 O. S. 186; Miller vs. Grice, 2 Rich. Law (S. C.) 27.

¹¹⁷ Woodward vs. Paine. 15 Johns. 493.

¹¹⁸ Bigelow vs. Stearns, 19 Johns. 39.

¹¹⁹ Sheldon vs. Hill, 33 Mich. 171.

See also Patzack vs. Von Gerichten, 10 Mo. App. 424. In this case the justice imposed a penal sentence in a case where the law only conferred jurisdiction to commit, and he was held liable in damages.

to the conclusion that as he had jurisdiction of the person and of the subject matter, and as his act was not without the inception of jurisdiction, but was one no more than in excess of or beyond jurisdiction, the act was judicial."¹²⁰

The distinction between acts done in excess of jurisdiction, and acts done in the absence of all jurisdiction of the subject matter, has been pointed out in numerous cases where the question of the personal responsibility of the Judge has arisen.

Where a Judge presiding at a criminal trial entered an order of disbarment against an attorney for his misconduct in a trial; in an action for damages against the Judge, he was held not liable, although the order of disbarment was in excess of the jurisdiction of the Court, and even though the order was entered maliciously. The Court had some jurisdiction in the matter for which disbarment was entered, and had jurisdiction of the person of the attorney who was charged with misconduct in the presence of the Court. The act of the Court was therefore considered judicial and subject to review, but not to an action for damages.¹²¹

¹²⁰ *Folger, J.*, in *Lange vs. Benedict*, 73 N. Y. 12. Continuing the learned judge says (p. 37.): "We are not unmindful of the considerations of the protection of the liberty of the person, and of the staying of a tendency to arbitrary exercise of power, urged with so much eloquence by the learned and accomplished counsel for the appellant. . . . Nor have we been disposed to outweigh those considerations, with that other class which sets forth the need of judicial independence, and of its freedom from vexation on account of judicial action, and of the interest that the public has therein. These are not antagonistic principles; they are simply countervailing. As with all other rules which act in the affairs of men, preponderance may not be fondly given to one to the disregard of the other;

each should have its due weight yielded to it, for thus only is a safe equipoise reached."

¹²¹ *Bradley vs. Fisher*, 13 Wallace 335, *Field, J.*: "It is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy the independence without which no judiciary can be either respectable or useful. . . . Nor can this exemption of the judges be affected by the motives with which their judicial acts are performed. The purity

Although the Court is in fact wholly without jurisdiction to hear a cause, if the Judge in good faith determines that he has jurisdiction, upon the question being presented to him as a plea in bar, his action is judicial and he can not be held in damages for the consequences.

While the Court does not acquire jurisdiction by merely deciding that he has it, yet he has the power to pass on all the questions which are presented to him in the case while it is pending, and his decision, although erroneous, that he has jurisdiction to proceed, is a judicial act which may be the subject of review.¹²²

of their motives can not in this way be the subject of judicial inquiry. . . . A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

See also *Ackerley vs. Parkinson*, 3 Maule and Selwyn 411.

Doepfner vs. The State, 36 Ind. 111. In this case the justice, acting in excess of his authority, directed a constable to be committed to jail for contempt. It was held that the sureties upon his bond were not liable.

But see *Piper vs. Pearson*, 2 Gray 120.

Even though the acts in excess of jurisdiction are shown to have been malicious or corrupt, the judge is not liable. *Bradley vs. Fisher* (*ubi supra*).

In *Fray vs. Blackburn*, 3 Best & Sm. 576, one of the judges of the court was sued for a judicial act, and the plaintiff asked leave to

amend by introducing an allegation of malice. In refusing the leave the Court said: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it is alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent their being harassed by vexatious actions."

¹²² *Austin vs. Vrooman*, 128 N. Y. 229; 28 N. E. 477. In this case the lack of jurisdiction was as to the power of a magistrate to try the defendant upon a criminal charge and impose a penalty, he having jurisdiction of the subject-matter and of the person, but merely for the purpose of remanding.

See also *Woodward vs. Paine*, 15 Johns. 492. Where the magistrate had no jurisdiction of the person or of the subject-matter, but erroneously decided that he had jurisdiction to hear a cause, held, that the magistrate was a trespasser, and that his

A noticeable tendency appears in the reported cases to apply a more strict rule of liability to inferior courts of limited jurisdiction than to the superior courts of more extensive jurisdiction. The substance of the reasoning in support of this appears to be that a Court of limited jurisdiction should solve all questions of doubt against its power, and that such Court does not violate its duties in declining to exercise a questionable authority, but that where a general jurisdiction is conferred the presumption arises that it is to be exercised broadly and with greater liberty, and that it would be an evasion of duty for such Judge to decline to act merely because doubt was expressed as to his jurisdiction.

The view which seems supported by stronger reasons is that the law should not protect one judicial officer and not another, and that there is no reason why a preference should be given the one who, from his higher position and superior learning, ought to be most free from error.¹²³

§169. Liability of judicial officers for ministerial acts.

A ministerial duty is one in regard to which nothing is left to discretion and is a definite duty imposed by law.¹²⁴ Judicial

decision as to his jurisdiction, although made in good faith, did not protect him. *Wingate vs. Waite*, 6 M. & W. 739.

But see *Grove vs. Van Duyn*, 44 N. J. L. 654.

¹²³ *Brooks vs. Mangan*, 86 Mich. 576; 49 N. W. 633. "It is conceded that circuit judges cannot be held liable in a civil action for any judicial determination, although such determination results in depriving the citizen temporarily of his liberty. Circuit judges are usually men of experience and education in the law, while justices of the peace seldom have any legal education or training. Upon what reason should the former be held exempt from li-

ability for their errors, while the latter must be severely punished for honest errors of judgment? I can find no reason in such a distinction."

Thompson vs. Jackson, 93 Iowa 376; 61 N. W. 1004; *Calhoun vs. Little*, 106 Ga. 336; 32 S. E. 86; *Lund vs. Hennessey*, 67 Ill. App. 233; *People vs. Suhre*, 97 Ill. App. 231.

¹²⁴ *State of Miss. vs. Johnson*, 4 Wall. 498.

Flournoy vs. Jeffersonville, 17 Ind. 169. "A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done."

officers are often charged with the performance of ministerial duties.

The act is none the less ministerial because the judicial officer is first required to perform judicial functions in determining his duty, such as to satisfy himself that the facts exist upon which his ministerial duty rests, or the exercise of his discretion respecting the means of performing it.

Such officer may be charged with the duty of making appointments in the public service; the act of passing upon the fitness of a person appointed is judicial, but the appointment is ministerial.¹²⁵

It has been held that the duty of granting a writ of Habeas Corpus is ministerial.¹²⁶

Where ministerial duties are cast upon judicial officers, and such duty is violated, the officer is civilly responsible for the damages resulting from his misconduct.

The issuing of an order of arrest by a Justice of the Peace, is considered a ministerial duty; the Statute having made such act mandatory upon the filing of a proper affidavit, and the officer has been held liable on his bond for not issuing such writ in the manner provided by law, such as the failure to require a proper undertaking before issuing the order.¹²⁷ So also a failure by a Justice of the Peace to issue execution when required by law is a breach of ministerial duty.¹²⁸

¹²⁵ Crane vs. Camp, 12 Conn. 464.

¹²⁶ Nash vs. People, 36 N. Y. 607.

¹²⁷ Place vs. Taylor, 22 O. S. 317, *Day, J.* "A justice of the peace acts in both a judicial and ministerial capacity. The manner of discharging his judicial duties is left to his own judgment; but, in general, the acts which he is required to perform in a particular way, and as to which he has no discretion about the manner of their performance, are of a ministerial character. In regard to the issuing of an order of arrest, everything to be done is specifically defined by the statute. Nothing is left to the discretion of

the justice; he must proceed in a specified manner. He acts in the same capacity that he does in issuing an execution after judgment. All these acts are such as, in the Court of Common Pleas, are performed by the clerk of the court, and are not dependent upon the exercise of judicial discretion; but are such as a party may demand to have done as of right. They are, therefore, ministerial acts."

¹²⁸ Gaylor vs. Hunt, 23 O. S. 255; Fairchild vs. Keith, 29 O. S. 156.

Contra—Wertheimer vs. Howard, 30 Mo. 420.

A Probate Judge has been held liable for issuing a marriage license to a minor contrary to law.¹²⁹

A Judge acting within his jurisdiction can not be held liable for judicial errors, but he must obey the mandatory requirements of the law, and his failure to do so will create a liability upon his official bond.¹³⁰

§170. Liability of principal for acts of his deputy.

A sheriff must answer for the official misconduct of his deputy, and his bond is liable for the acts of the deputy the same as if the things complained of were done by the principal, even though no such express condition appears in the bond. The act is that of the principal, although performed by the deputy.¹³¹

The default of the deputy must relate, however, to acts which the law requires him to perform in his official capacity. A tort or fraud committed by the deputy, while in the act of performing his duty, the duty itself being regularly performed, will not bind the principal, but the irregular performance of a duty, such as a failure to pay over money by a Deputy Sheriff made on execution, will bind the Sheriff and his sureties. A misrepresentation by a deputy as to the title of property sold at public sale, is considered unofficial, and the principal is not responsible.¹³²

The rule as to a Sheriff, Marshal, or Constable, whereby they are held for damages resulting from the irregularities of their deputies, is not extended to other classes of official subordinates, who are themselves considered as public officers and liable directly to the party injured.

¹²⁹ Wood vs. Farnell, 50 Ala. 546.

¹³⁰ Grider vs. Tally, 77 Ala. 422; Stone vs. City of Augusta, 46 Me. 127; Stone vs. Graves, 8 Mo. 148; Pike vs. Megoun, 44 Mo. 491; People vs. Bush, 40 Cal. 344; State vs. Carrick, 70 Md. 586; 17 Atl. 559; McTeer vs. Lebow, 85 Tenn. 121; 2 S. W. 18; Wilson vs. Marsh, 34 Vt. 352; Ferguson vs. Kinnoull, 9 Clark & Fin. 251.

¹³¹ Crawford vs. Howard, 9 Ga. 314; Brayton vs. Town, 12 Iowa 346; Thomas vs. Kinkead, 55 Ark. 503; 18 S. W. 854; Brown vs. Weaver, 76 Miss. 7; 23 South. 388; Case vs. Hulsebush, 122 Ala. 212; 26 So. 155; Johnson vs. Williams, 111 Ky. 289; 63 S. W. 759; Deason vs. Gray, 189 Ala. 672; 66 So. 646.

¹³² Lewark vs. Carter, 117 Ind. 206; 20 N. E. 119.

It is said that since the government is not itself responsible for the wrongs and misfeasance of public officers, to whom it has granted a franchise, that such officers in turn, who extend the franchise to a deputy, with the consent of the government, should not respond for the acts of negligence or wrong of such deputy where they are not themselves a party to it; and further, on the grounds of public policy, it is urged that "competent persons could not be found to fill positions of the kind if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates in the discharge of duties, which it would be utterly impossible for the superior officer to discharge in person."¹³³

§171. Liability on bond of a notary public.

A Notary Public violates his duty and renders his sureties liable upon his bond when he uses his official franchise for a wrongful purpose,¹³⁴ or for the negligent performance of a duty whereby another is injured.¹³⁵

The sureties upon a Notary's bond are liable, although the officer acts without any intent to violate the law or his duty.¹³⁶

§172. Defenses in actions upon bonds of public officers.

While the law does not favor forfeitures, and will not generally entertain defenses which are merely technical, such as

¹³³ *Robertson vs. Sichel*, 127 U. S. 507; 8 S. Ct. 1286. In this case the deputy collector of customs by his negligence caused a loss to an owner of baggage arriving at the port of New York, and the collector was sued for damages. It was held that he was not liable.

See also *Conwell vs. Voorhees*, 13 O. 523; *Scott Co. vs. Fluke*, 34 Iowa 317; *Foster vs. Metts*, 55 Miss. 77; *Bowden vs. Derby*, 97 Maine 536; 55 Atl. 417; *Barker vs. C. P. & St. L. Ry. Co.*, 243 Ill. 482; 90 N. E. 1057.

It is held that a postmaster is

liable on his bond for the defaults of his deputy, although the latter is not appointed by the postmaster, and holds his office by appointment under the Civil Service rules of the government. *Bryan vs. United States*, 90 Fed. Rep. 473.

¹³⁴ *Doran vs. Butler*, 74 Mich. 643; 42 N. W. 273; *People vs. Bartels*, 138 Ill. 322; 27 N. E. 1091.

¹³⁵ *Lescouzeve vs. Ducatel*, 18 La. Ann. 470; *Curtiss vs. Colby*, 39 Mich. 456; *Scotten vs. Fegan*, 62 Iowa 236; 17 N. W. 491.

¹³⁶ *Weintz vs. Kramer*, 44 La. Ann. 35; 10 South. 416; *Heidt vs. Minor*, 89 Cal. 115; 26 Pac. 627.

where the Statute requires the bond to be filed by a certain date, or to be approved by a certain officer,¹³⁷ and these requirements are not complied with, yet the equitable rules of construction in suretyship apply to official bonds, and although a non-conformance of Statute does not work a forfeiture, where no injury results to the surety, the bond will nevertheless not be enforced, except according to its exact terms. "Sureties stand upon the words of the bond, and if the words will not make them liable, nothing can. There is no construction, no equity against sureties. If the bond can not have effect according to its exact words, the law does not authorize the court to give it effect in some other way, in order that it may prevail."¹³⁸

A ministerial officer, such as a Sheriff or Constable, charged with the duty of executing the mandate of a Court, is fully protected in executing a process issued to him by a Court of proper jurisdiction and authority, and may generally defend against the consequences of executing such process by showing that he acted wholly within its requirements.

In order that the process of the Court shall suffice as a protection to the officer serving it, there must be nothing on the face of it to indicate that it was without authority or jurisdiction.¹³⁹

If the process is fair upon its face, and does not disclose any lack of authority or other irregularity in its issue, it has been

¹³⁷ Ante Sec. 164, 166.

¹³⁸ *State vs. Medary*, 17 O. 565.

¹³⁹ *Sheldon vs. Van Buskirk*, 2 N. Y. 473.

Hill vs. Haynes, 54 N. Y. 153. In this case the execution was void, but nothing appeared on the writ, whereby the officer was in any way notified of the invalidity, and it was held that the officer was protected from the consequences of the wrongful levy.

Mathews vs. Densmore, 109 U. S. 216; 3 S. Ct. 126; *Baker vs. Sheehan*, 29 Minn. 235; 12 N. W. 704; *Cogburn vs. Spence*, 15 Ala. 549; *Norcross vs. Nunan*, 61 Cal. 640; *Watson vs. Watson*, 9 Conn. 140; *Chipstead vs. Porter*, 63 Ga. 220; *State vs. McNally*, 34 Me. 210; *Lashus vs. Matthews*, 75 Me. 446; *Underwood vs. Robinson*, 106 Mass. 296; *Hann vs. Lloyd*, 50 N. J. L. 1; 11 Atl. 346.

held that the officer is protected in the service, even though he knows that the issuing of the writ was irregular.¹⁴⁰

Where the jurisdiction or authority to issue the process is not apparent on the writ, the burden of showing the validity of the writ is upon the officer.¹⁴¹

An officer is protected by his writ, even though he knows that the person against whom the process was directed is privileged from its service.¹⁴² While it may be regarded as a settled rule that public officers are answerable in damages to any one who is specially injured by their omission to perform what the law requires of them, or by a careless or negligent performance of the duties of their office,—yet the law will excuse the non-performance of a prescribed duty, where the officer is prevented by circumstances beyond his control from exercising the functions of his office, as where no funds are available with which to carry on the work which belongs to his office, and no authority is vested in them to supply the funds.

While a commissioner of public highways would be liable to a civil action for damages caused by his negligence in failing to keep in repair the roads and bridges under his control, such liability only attaches where he either has sufficient funds at his command to do the work, or has authority to raise the funds.¹⁴³

An officer may refuse to act under the authority of an unconstitutional Statute, but the invalidity of the act can not be invoked as a defense against his misconduct, where he treats the Statute as valid and assumes to act under it.¹⁴⁴

¹⁴⁰ *People vs. Warren*, 5 Hill (N. Y.) 440.

Contra—*Grace vs. Mitchell*, 31 Wis. 533; *Leachman vs. Dougherty*, 81 Ill. 324.

¹⁴¹ *Chase vs. Ingalls*, 97 Mass. 524; *Smith vs. Keniston*, 100 Mass. 172.

¹⁴² *Smith vs. Jones*, 76 Me. 138; *Cassier vs. Fales*, 139 Mass. 461; 1 N. E. 922.

¹⁴³ *Garlinghouse vs. Jacobs*, 29 N.

Y. 297; *Hover vs. Barkhoof*, 44 N. Y. 113; *Bennett vs. Whitney*, 94 N. Y. 302.

¹⁴⁴ *Olean vs. King*, 116 N. Y. 355; 22 N. E. 559. The defense made by the sureties in this case was, that the tax levy was invalid, and that the bond did not cover a default in accounting for the funds which the officer had no right to receive. Held —“While a tax collector may decline to proceed in the collection of

Defenses resulting from an alteration of an official bond or a change in the duties of the officer, or an extension of the tenure of the office, have been considered in the earlier part of this chapter.¹⁴⁵

§173. Presumption that official duty has been performed.

. It would seem to be indispensable to the orderly administration of public affairs that the good faith of those charged with public duties should be presumed, and so far as the motive of the officer is concerned this presumption is conclusive in all cases where the officer acts within the letter of the law, or in other words, if the act would be valid if done in good faith, all persons will be estopped from questioning the motives.¹⁴⁶

It will also be presumed that the official act was valid and regular if it purports to be such on its face, and that the officer performed his duty as required by law.

Where an index book showed an entry of the judgment, but the judgment roll or record could not be found, the index was considered as evidence that the judgment had been duly rendered and recorded, since it would be presumed that the clerk would not have indexed the matter unless the record had been before him, the Court saying: "The presumption is that

a tax illegally levied, as any person may refuse to recognize any illegal authority, or to obey an unconstitutional law, he may do so only for his own protection. Having collected a tax, he can not then question the right of the proper authority to receive it, but must pay it over."

Brunswick vs. Snow, 73 Me. 177; *State vs. Harney*, 57 Miss. 863; *Webb Co. vs. Gonzales*, 69 Tex. 455; 6 S. W. 781; *Chandler vs. State*, 1 Lea (Tenn.) 296; *Lincoln vs. Chapin*, 132 Mass. 470; *Feigert vs. State*, 31 O. S. 432.

The officer is not relieved from performing his duty because he held an honest belief that the Statute

under which he was required to act was unconstitutional. Ignorance or mistake in judgment as to the validity of a law, does not excuse an officer for its disobedience. *Clark vs. Miller*, 54 N. Y. 528.

¹⁴⁵ Ante Sec. 169, 170, 171.

For a discussion of the effect upon the liability of the sureties upon an official bond, where the legislature has extended the time within which the officer must make his settlements, see Ante Sec. 87.

¹⁴⁶ *Taylor vs. Alexander*, 6 O. 144; *Webster vs. Washington Co.*, 26 Minn. 220; 2 N. W. 697; *Seaver vs. Pierce*, 42 Vt. 325.

no official person, acting under oath of office, will do aught which it is against his official duty to do, or will omit to do aught which his official duty requires should be done.”¹⁴⁷

But the courts will not use the rule of presumption to supply fundamental jurisdictional defects, while there always arises a presumption that a public officer has performed his duty, there is no presumption as to his authority to do what he has undertaken.

In accordance with this principle it was held that where school trustees omitted to give notice of an assessment of taxable property, that such omission was jurisdictional and invalidated the tax and rendered the trustees liable as trespassers in making a levy upon the property for the collection of such tax, and that there was no presumption of notice arising from the fact that the levy was made, and that the rule of presumption as to the performance of official duty did not apply to such jurisdictional defect.¹⁴⁸

§174. Evidence against sureties on official bonds.

A public officer by declaring his own default does not thereby preclude the Surety upon his Bond from showing the facts, such admission while binding upon the principal is not conclusive against his Surety.

No rule of evidence can be justified which permits a principal who has failed to keep faith with his Surety, and who

¹⁴⁷ *Mandeville vs. Reynolds*, 68 N. Y. 534.

United States Bank vs. Danridge, 12 Wheat. 69, *Story, J.*: “By the general rules of evidence, presumptions are continually made, in cases of private persons, of acts of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions

intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes that every man, in his private and official character, does his duty, until the contrary is proved.”

Washington vs. Hosp, 43 Kan. 324; 23 Pac. 564; *Davany vs. Koon*, 45 Miss. 71; *Owen vs. Baker*, 101 Mo. 407; 14 S. W. 175.

¹⁴⁸ *Jewell vs. Van Steenburgh*, 58 N. Y. 85; *City of Albany vs. McNamara*, 117 N. Y. 168; 22 N. E. 931.

has violated his oath of office, to furnish by direct declaration, the proof whereby the Surety is charged for his default.

It is what the principal does and not what he may say he has done for which the Surety is liable, and unless these declarations are made at the time of the default they are of no higher character than mere hearsay, and the Surety is entitled to have the proof made by original evidence.¹⁴⁹

If, however, the declarations are made at the time of the transaction to which they relate, and are contemporaneous with the default, and illustrate its character, they then become a part of the *res gestae* and are admissible against the Surety.¹⁵⁰

The entries which an officer makes in his books, showing balances against himself for which he does not account, are generally received as prima facie evidence in an action against his Surety, but the Surety is not estopped from showing that the statement of the books is incorrect.^{150a}

Where an officer holds office two successive terms, with separate sureties each term, and at the close of his first term his books show an apparent balance on hand, but which in fact had been previously converted, the statement of the books was held not to be an admission whereby the sureties upon the second Bond would be conclusively bound.¹⁵¹

mit the money to be then in his
¹⁴⁹ Hatch vs. Elkins, 65 N. Y. 489; Stetson vs. Bank, 2 O. S. 167; Lewis vs. Lee Co., 73 Ala. 148.

¹⁵⁰ Blair vs. Perpetual Insurance Co., 10 Mo. 559; Society vs. Fitzwilliams, 84 Mo. 406; Casky vs. Haviland, 13 Ala. 314; Parker vs. State, 8 Blackf. (Ind.) 292; Dobbs vs. The Justices, 17 Ga. 624; McKim vs. Blake, 139 Mass. 593; 2 N. E. 157; Paxton vs. State, 59 Neb. 460; 81 N. W. 383.

^{150a} Pundmann vs. Schoenich, 144 Mo. 149, 45 S. W. 1112.

¹⁵¹ Bissell vs. Saxton, 66 N. Y. 55.

United States vs. Boyd, 5 How. 29, Nelson, J.: "It has been contended, that the returns of the receiver to the treasury department after the execution of the bond, which ad-

hands to the amount claimed, should be conclusive upon the sureties. We do not think so. The accounts rendered to the department of money received, properly authenticated, are evidence, in the first instance, of the indebtedness of the officer against the sureties; but subject to explanation and contradiction. They are responsible for all the public moneys which were in his hands at the date of the bond, or that may have come into them afterwards, and not properly accounted for; but not for moneys which the officer may choose falsely to admit in his hands, in his account with the government. The sureties cannot be concluded by

Admissions of the officer after the termination of his office or after his removal are not admissible against his sureties.¹⁵²

Where the principal and Surety are sued jointly, the admission of the principal being competent against himself can not be excluded, and being admitted as against him, will generally be considered against the sureties.¹⁵³

§175. Same subject — Judgment against principal as evidence against the surety.

Three distinct views are maintained upon the question of the effect to be given to a judgment against the principal in establishing a liability against the surety.

(a) That such judgment is not admissible against the surety.

(b) That a judgment against the principal is *prima facie* evidence against the surety.

(c) That such judgment is conclusive against the surety.

The first of these positions is supported by the somewhat plausible argument that an official bond is different in its terms from a bond of indemnity against a failure to perform a spe-

a fabricated account of their principal with his creditors; they may always inquire into the reality and truth of the transactions existing between them."

State vs. Rhoades, 6 Nov. 352; Mann vs. Yazoo City, 31 Miss. 574; Supervisors vs. Bristol, 99 N. Y. 316; 1 N. E. 878; Hatch vs. Attleborough, 97 Mass. 533; Lowry vs. State, 64 Ind. 421; McShane vs. Howard Bank, 73 Md. 135; 20 Atl. 776.

Contra—Morley vs. Metamora, 78 Ill. 394; Chicago vs. Gage, 95 Ill. 593; Longan vs. Taylor, 130 Ill. 412; 22 N. E. 745.

But see Schureman vs. People, 55 Ill. App. 629. Where the books kept by a treasurer in a banking house of which he was sole proprietor were considered not conclusive upon the sureties.

Sooy vs. State, 41 N. J. L. 394; Boone Co. vs. Jones, 54 Iowa 699; 2 N. W. 987; 7 N. W. 155.

See also Bagot vs. State, 33 Ind. 262. Where it was held that the sheriff's return showing the collection of money on execution was conclusive against the sureties in an action against them for a failure of the officer to pay over the money.

¹⁵² Evans vs. State Bank, 13 Ala. 787; Comm. vs. Brassfield, 7 B. Mon. (Ky.) 447; City of St. Louis vs. Foster, 24 Mo. 141; Jenness vs. City of Black Hawk, 2 Colo. 578; Lacoste vs. Bexar Co., 28 Tex. 420.

¹⁵³ Magner vs. Knowles, 67 Ill. 325; Montgomery vs. Dillingham, 11 Miss. 647; Amherst Bank vs. Root, 2 Met. 522; Parker vs. State, 8 Blackf. (Ind.) 292.

But see Root vs. Caldwell, 54 Iowa 432; 6 N. W. 695.

cific act, such as a bond that a principal will pay a certain sum of money or satisfy a judgment. A finding against the principal on default of either of these conditions might well be considered *prima facie* evidence against the surety, or even conclusive, since the surety agreed that the principal would do the particular things of which he has been adjudged in default.

But in official bonds, the sureties undertake that the principal will perform his official duties, and it is necessary for a recovery against the surety to show what the duty in the particular case was, and that such duty was not performed, and that, if a judgment to which the surety was not a party is admissible as *prima facie* evidence, the surety in meeting this, is placed in the position of being required to prove what the conduct of the principal was, and then justify it with further proof concerning the duty of the principal, placing upon the defendant a burden which should rest upon the plaintiff.¹⁵⁴

¹⁵⁴ A leading case supporting this view is, *Pico vs. Webster*, 14 Cal. 203, in which the Court says: "There can be no doubt, that where a surety undertakes for the principal, that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such case stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact. It is upon this ground that the liability of bail is fixed absolutely by the judgment against the principal. But this rule rests upon the terms of the contract. In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties. They

do not agree to be absolutely bound by any judgment obtained against him for official misconduct, nor to pay every such judgment. They are only held for a breach of their own obligations. It is a general principle, that no party can be so held without an opportunity to be heard in defense. This right is not divested by the fact, that another party has defended on the same cause of action and been unsuccessful. As the sureties did not stipulate that they would abide by the judgment against the principal, or permit him to conduct the defense, and be themselves responsible for the result of it, the fact that the principal has unsuccessfully defended, has no effect on their rights. They have a right to contest with the plaintiff the question of their liability; for, to hold that they are concluded from this contestation by the suit against the sheriff, is to hold that they undertook for him that they would be responsible for any judgment

It is also urged that a judgment against the principal should either be deemed of no effect against the surety, or else be taken as conclusive; that there is no consistent middle ground of holding such judgment as being *prima facie* evidence and subject to rebuttal proof rendering the judgment of no effect.¹⁵⁵

The record of a proceeding in amercement has also been held admissible against the sureties of the officer.¹⁵⁶

§176. Same subject — View that judgment against the principal is *prima facie* evidence against the surety.

The great preponderance of holding in this County is to the effect that, though a surety is not a party to a judgment against the principal, yet when a competent judicial tribunal has determined the fact that there has been a breach of official duty, such fact should be considered as established against the surety, until he meets the issue by competent proof showing the contrary: that two judgments finding the same fact should not be required, except where the surety specifically elects to try the matter anew.

The rule that a judgment against the principal is *prima facie* evidence against the surety, gives to the surety the right to adduce proof in rebuttal of all points on which the judgment against the principal depends.

It is said by the Court in a leading case, "While the authorities are wide apart on the question it is evident that the decided weight is in favor of the doctrine that a judgment against the principal upon an official bond is *prima facie* evidence against the sureties. By this rule the right is reserved to such sureties

against him, which might be rendered by accident, negligence, or error, instead of merely stipulating that they would be responsible for his official conduct."

Bailey vs. Butterfield, 14 Me. 112; People vs. Russell, 25 Hun 524; McDowell vs. Burwell, 4 Rand. (Va.)

317; People vs. Zingraf, 43 Ill. App. 337; Rodini vs. Lytle, 17 Mont. 448; 43 N. W. 501; State vs. Leeds, 31 N. J. L. 185.

¹⁵⁵ Lucas vs. The Governor, 6 Ala. 826.

¹⁵⁶ Governor vs. Montfort, 23 N. C. 155.

to interpose any defense they may have, and to be fully heard on the merits." ¹⁵⁷

§177. Same subject — View that judgment against the principal is conclusive against the surety.

Where a judgment was entered against the principal for default and thereafter a joint action was begun upon the bond against the principal and surety, it was held that the judgment

¹⁵⁷ *Beauchaine vs. McKinnon*, 55 Minn. 318; 56 N. W. 1065.

See also *Moses vs. United States*, 166 U. S. 571; 17 S. Ct. 682; *Norris vs. Mersereau*, 74 Mich. 687; 42 N. W. 153; *Dane vs. Gilmore*, 51 Me. 544; *Carr vs. Meade*, 77 Va. 142; *State vs. Jennings*, 14 O. S. 73; *State vs. Cason*, 11 S. C. 392; *Heath vs. Shrempf*, 22 La. Ann. 167; *De Greiff vs. Wilson*, 30 N. J. Eq. 435; *Connor vs. Corson*, 13 S. D. 550; 83 N. W. 588.

Stephens vs. Shafer, 48 Wis. 54; 3 N. W. 835, *Taylor, J.*: "The nature of the contract in official bonds is that of a bond of indemnity to those who may suffer damages by reason of the neglect, fraud or misconduct of the officer. The bond is made with the full knowledge and understanding that in many cases such damages must be ascertained and liquidated by an action against the officer for whose acts the sureties make themselves liable; and the fair construction of the contract of the sureties is, that they will pay all damages so ascertained and liquidated in an action against their principal. This construction of the contract is most reasonable, and works no hardship against the sureties. . . . The principal is the one who ought to be at the expense of the litigation, and who ought to pay the damages. He is also the

one who has the knowledge of the facts, and is certainly better prepared to litigate the matter than the sureties, who are not supposed to have any knowledge of the transaction. Certainly the defense is likely to be properly made by the principal, who has full knowledge of the facts, and who is to suffer most severely in case of a decision adverse to him. In most cases of this kind, if the sureties were sued in the first instance, with their principal, the defense of the action would be made by such principal; and yet the judgment in such an action would necessarily be conclusive upon all. Holding the judgment against the principal alone presumptive evidence, as against the sureties, of the facts established by such judgment, can work no hardship so long as the right is reserved to them of showing that the defense in such action was not made in good faith, was fraudulent, collusive, or suffered to be obtained through mistake as to the facts."

Charles vs. Hoskins, 14 Iowa 471.

A judgment in amercement against a sheriff was held prima facie evidence against the sureties in *Fay vs. Edmiston*, 25 Kan. 439.

See also *Fire Association of Philadelphia vs. Ruby*, 49 Neb. 584; 68 N. W. 939; *Barker v. Wheeler*, 60 Neb. 470; 83 N. W. 678.

against the principal was conclusive against the surety, and this was placed upon the ground that it ought in any event to be conclusive against the principal, and that of necessity it must also be binding against the surety in a joint action, for otherwise the whole controversy must be opened up even against the principal.¹⁵⁸

The doctrine that the judgment against the principal is conclusive against the surety does not, however, rest wholly upon the cases where a joint action is brought, but is also applied by some courts where the contract is joint and several and the surety is sued alone.¹⁵⁹

One of the reasons urged in support of this view is that since a judgment in favor of a principal is conclusive in favor of the surety, that it should be conclusive when against the principal.

It is well settled that no recovery can be had against the surety upon a bond if a judgment has already been entered in favor of the principal,^{159a} or if a judgment has been rendered against the principal for a smaller amount than the sum claimed in the action against the surety, the plaintiff will be

¹⁵⁸ Tracy vs. Goodwin, 5 Allen 409. "If no part of the judgment has been paid, the amount of it is the amount due from him on the bond. And the sureties have so made their bond that a joint judgment must be rendered in this suit against all the defendants. If they were permitted to open the matter, and show that the plaintiff ought not to have recovered his judgment, in whole or in part, their defense must enure to the benefit of the principal as well as to theirs. We think it more in conformity with the true intent and spirit of their obligation to hold that it is a guaranty to the plaintiff for such amount as he has legally established to be due to himself from the constable; and that in the absence of fraud or collusion, the judgment against him

settles conclusively against his sureties, as well as himself, not only the right of the plaintiff to recover against him, but the amount of the damages. If the bond had been several as well as joint, there would have been less embarrassment in treating the evidence as *prima facie*, and permitting the sureties to offer rebutting evidence."

See also Dennie vs. Smith, 129 Mass. 143; Treasurer of the City of Boston vs. Shapero, 217 Mass. 71.

¹⁵⁹ Masser vs. Strickland, 17 Serg. & R. 354; Evans vs. Comm., 8 Watts (Pa.) 398; McMicken vs. Comm., 58 Pa. 214; Cony vs. Barrows, 46 Me. 497; Thomas vs. Markmann, 43 Neb. 823; 62 N. W. 206; Chamberlain vs. Godfrey, 36 Vt. 380; Slatery vs. Schapero, 217 Mass. 71; 104 N. E. 440; Ann. Cases 1915D, 399, note.

^{159a} Stevens vs. Carroll, 131 Iowa 170; 105 N. W. 653.

limited in his recovery to the amount of the judgment against the principal.¹⁶⁰

Where the judgment is first obtained against the surety, and afterwards in a separate action against the principal, the judgment is in favor of the defendant. The surety may be exonerated by a perpetual injunction against the collection of the judgment.¹⁶¹

§178. Limitations upon actions against sureties on official bonds.

Statutory provisions exist in all the States limiting the time within which an action can be brought upon an official bond, and as in the case of bonds, to secure private obligations, the statutes do not usually undertake to define when the cause of action accrues.¹⁶²

The courts have experienced some difficulty in fixing a rule as to the time the statute begins to run, and there is much diversity of holding in this respect.

In a number of the States the courts have not adhered to the construction first announced. The prevailing rule seems to be that the statute begins to run from the time of demand upon the officer for settlement, although a person having a claim against an officer for default will be required to assert his rights by making a demand within a reasonable time, and where no demand is made the law generally presumes a demand after a lapse of time equal to the statutory limitations.

Thus where a sheriff converted money of the plaintiff for his own use in 1855, and no demand was made until 1867 and the action brought in 1868, it was held that a demand would be presumed in 1865, ten years being the statutory limitation,

¹⁶⁰ United States vs. Allsbury, 4 Wall. 186. In this case a paymaster was sued upon an alleged shortage of about \$20,000.00, and judgment was rendered against him for \$10,000.00.

In a subsequent action against the sureties it was held that the liability

against the sureties could not exceed that which had been ascertained to be due from the principal in the former action.

See also Brown vs. Bradford, 30 Ga. 927.

¹⁶¹ Ames vs. Maclay, 14 Iowa 281.

¹⁶² Ante Sec. 159.

and the action could thereafter be brought at any time before 1875.¹⁶³

¹⁶³ Keithler vs. Foster, 22 O. S. 27.

The presumption of demand at the expiration of the statutory period of limitation is approved in Thrall vs. Mead, 40 Vt. 540.

Codman vs. Rogers, 10 Pick. 112.

The statute of limitations begins to run on an official or surety bond from the breach thereof, and not from its date. McGovern vs. Rectanus, 139 Ky. 365; 105 S. W. 965; 14 L. R. A. (N.S.) 380; McKim vs. Glover, 161 Mass. 418; 37

N. E. 443; U. S. F. & G. Co. vs. Citizens' State Bank, 36 N. D. 16; 161 N. W. 562; L. R. A. 1918E, 326; Williams vs. Flippin, 68 Miss. 680; 10 So. 52.

It is said that limitation does not begin to run on the bond of a public officer until the term of his office for which such bond was given has expired, even if the wrongful conversion took place some time before. People vs. Van Ness, 79 Cal. 84; 21 Pac. 554.

CHAPTER VII.

JUDICIAL BONDS.

- Sec. 179. Suretyship in the Application of Legal Remedies.
- Sec. 180. Bonds for Stay of Execution or Appeal.
- Sec. 181. Statutory Requirements as to Appeal or Stay Bonds.
- Sec. 182. Irregularities or Defects whereby Bonds are Invalidated.
- Sec. 183. Immaterial Defects in the Contract.
- Sec. 184. Failure to Perfect the Appeal.
- Sec. 185. Conditions upon which Appeal or Stay Bonds become Payable.
- Sec. 186. Same Subject—Affirmance by failure to Prosecute Appeal.
- Sec. 187. As to when Action may be brought upon Bond for Appeal.
- Sec. 188. Measure of Damages in an Action upon an Appeal or Stay Bond.
- Sec. 189. Successive Appeal Bonds.
- Sec. 190. Defenses in Actions upon Appeal Bonds—Estoppel.
- Sec. 191. Appeal from a Justice Court.
- Sec. 192. Bonds to Procure Injunction.
- Sec. 193. When Action for Damages upon an Injunction Bond Accrues.
- Sec. 194. Construction of Bonds to Procure Injunction.
- Sec. 195. Defenses of Sureties upon Injunction Bonds.
- Sec. 196. Measure of Damages for Breach of Injunction Bond.
- Sec. 197. Same Subject—Defendant's Expenses in Procuring a Dissolution of Injunction.
- Sec. 198. Attachment Bonds.
- Sec. 199. Attachment Bonds not Forfeited for Irregularities of Execution or Defects in Form.
- Sec. 200. Whether Damages for Malicious Prosecution are Recoverable upon Bond to Procure Attachment.
- Sec. 201. Forthcoming or Redelivery Bonds.
- Sec. 202. Bonds to Discharge Attachment.
- Sec. 203. When Action Accrues upon Bonds in Attachment.
- Sec. 204. Good Faith of the Plaintiff, or Probable Cause for Attachment not a Defense in Actions upon Bonds.
- Sec. 205. Sureties Estopped from Questioning the Regularity of the Proceedings out of which their Liability Arises.
- Sec. 206. Exoneration of Sureties in Attachment Proceedings.
- Sec. 207. Attachment Bonds are Available in any Court to which the Case is taken on Appeal.
- Sec. 208. Measure of Damages in Actions upon Attachment Bonds.
- Sec. 209. Replevin Bonds.
- Sec. 210. Conditions of Bonds in Replevin.
- Sec. 211. Bonds in Replevin which are Void.
- Sec. 212. What Constitutes a Breach of a Replevin Bond.

- Sec. 213. Sureties upon Replevin Bonds are Concluded by the Final Order in the Replevin Action.
- Sec. 214. Measure of Damages in Action upon Replevin Bonds.
- Sec. 215. Defenses in Action on Replevin Bonds.
- Sec. 216. Bonds given in the Course of the Administration of Estates of Deceased Persons.
- Sec. 217. Duties for which Executors and Administrators are Chargeable on their Bonds.
- Sec. 218. The Scope of the Administration Bond Covers all Assets and Equities of the Estate.
- Sec. 219. Successive Administration Bonds are Cumulative.
- Sec. 220. As to whether Judgment or Order of Court against the Principal is Necessary to a Cause of Action on the Administration Bond.
- Sec. 221. The Sureties upon the Bond of an Administration are Concluded by Judgment against the Principal.
- Sec. 222. Defenses to Action upon Administration Bonds.
- Sec. 223. Who may Maintain Action on Administration Bonds.
- Sec. 224. Bonds of Guardians—Scope of Liability.
- Sec. 225. Settlement of Guardian's Accounts—Release of Sureties on the Bond.
- Sec. 226. An Adjudication Against the Guardian is Conclusive against the Sureties.
- Sec. 227. Bonds given in the Course of Insolvency Proceedings.
- Sec. 228. Bail Bonds.
- Sec. 229. Conditions in Bail Bonds—Time of Appearance.
- Sec. 230. Same Subject—Place of Appearance.
- Sec. 231. Defenses against Bail Bonds.
- Sec. 232. Discharge or Exoneration of Bail.

§179. Suretyship in the application of legal remedies.

It is somewhat of an anomaly for the law to require a party to a legal action to indemnify his opponent against damages resulting from such proceedings.

The law itself having authorized the bringing of an action and made provision for the review in a higher court of the questions made at the trial, any limitation upon the use of the courts to effectuate these privileges is inconsistent with the theory of abstract right, for the maintenance of which courts are created.

There are, however, numerous provisions of the law which limit the bringing of an action, or the review of a judgment, except upon the condition that the plaintiff indemnifies the

other party against the loss which may result to him as a necessary incident to the proceeding.

The anomaly is more marked in the matter of the enforcement of such provisional remedies as attachment or injunction, where the damages, if any, flow directly from an order or judgment of the court, and where the party is required to give bond to secure the payment of the damages that may arise in case the order or judgment of the court should turn out to be wrong.

So also, although the Constitution creates courts and opens their doors for all citizens to invoke their decrees, yet in many cases the statutes require a party to enter into an undertaking in suretyship before starting his action, frequently requiring him to secure the costs of litigation, even though he finally prevails against his opponent, in case the latter, although adjudged to pay costs, is insolvent.

These requirements of the law have been engrafted upon our procedure from time to time as the necessity has developed. The liberal extension of the right to invoke legal remedies has made imperative some check against the abuse of the privilege; without requirements to secure the costs of an action, vexatious litigation, actions begun in bad faith and without even a probable cause, have resulted, which impose burdens on the courts and the officers who serve their processes, which were not contemplated by the Constitution.

The common law made no provision for bonds in stay of execution, and the filing of a writ of error in the Reviewing Court of itself operated as a stay or *supersedeas* of execution from the time of its allowance or recognition by the court to which it was directed.

In England a writ of *supersedeas* was issued from the Reviewing Court to the Inferior Court, stopping all further proceedings in the latter court, and without any security being given to the defendant in error. But these proceedings in error came to be sued out merely for the purpose of delay, and Acts of Parliament were passed requiring security in certain

cases before the writ should operate as a supersedeas.¹ Later the statute extended the provision to all cases.²

The Federal Judiciary Act of 1789 provides that a party prosecuting error and an appeal shall give good and sufficient security, that the plaintiff in error, or the appellant, shall prosecute his writ or appeal to effect, and if he fail to make his plea good "shall answer all damages and costs."³

The language of this statute as well as the controlling precedents in England from which the procedure was adopted, seem to indicate that the bond provided for was merely to secure the costs in the appellate court and the damages incident to delay, with no provision for securing the judgment.

The United States Supreme Court, however, construed the "damages" to include the payment of the original decree,⁴ without any specific provision in the statute relating to the payment of the judgment as is found in nearly all the State statutes.⁵

¹ Statute of 3 James I., c. 8. This statute required security only in cases of proceedings to reverse judgments upon a bond, or contract, or a debt for rent.

² 13 Car. II., c. 2; 16 and 17 Car. II., c. 8.

³ Sec. 1000, U. S. Statutes.

⁴ Catlett vs. Brodie, 9 Wheat. 553, Story, J.: "The judiciary act of 1789, ch. 20, s. 22, requires every judge or justice, signing a citation on a writ of error, to take good and sufficient security that the plaintiff in error 'shall prosecute his writ to effect, and answer all damages and costs if he fails to make his plea good.' A writ of error lodged in the clerk's office within ten days after the rendition of judgment, operates as a *supersedeas* of execution; and the question arises, whether, in cases where it operates as a *supersedeas*, the security taken by the judge or justice ought to be

sufficient to secure the whole amount of the judgment. It has been supposed, at the argument, that the act meant only to provide for such damages and costs as the Court should adjudge for the delay. But our opinion is, that this is not the true interpretation of the language. The word 'damages' is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to, if the judgment is affirmed. Whatever losses he may sustain by the judgment's not being satisfied and paid after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security." Kountze vs. Omaha Hotel Co., 107 U. S. 378.

⁵ The statute in Ohio provides that no proceedings to reverse, vacate, or modify a judgment or an order rendered in an inferior court,

Again it was found that hasty orders of injunction resulted in damages to the defendant for which he was unable to get redress, even from the plaintiff himself, as the latter had entered into no contractual relation with the defendant to respond in damages, and the cases in which the courts were misled by false or mistaken allegations in the pleadings, imposed special burdens on the defendant, which induced the Courts of Equity, of their own motion, and without any directing statute, to require the applicant for these extraordinary remedies to furnish an undertaking for the protection of the defendant, and to enable the court to punish the plaintiff in case his allegations were unsupported by proof.⁶

This form of judicial bond, at first resting in the discretion of the court, became later the subject of rules of chancery such as that laid down in general orders by the Chancellor of New

shall operate to stay execution, unless the clerk of the court in which such judgment or order is made take a written undertaking, with sufficient surety conditioned to pay the judgment if it be affirmed in whole or in part. R. S. O., Sec. 6718.

Or if the proceeding is an appeal whereby the case is retried on new evidence in the Appellate Court the statute provides that the bond shall be conditioned that the appellant shall abide and perform the order and judgment of the Appellate Court, and shall pay all money, costs, and damages which may be required of or awarded against him by such Court. R. S. O., Sec. 5231.

⁶ *Marquis of Downshire vs. Lady Sandys*, 6 Ves. Jr. 107; *Wilkins vs. Aikin*, 17 Ves. Jr. 422.

No act of Congress has ever been passed authorizing the Federal Courts of the United States to require an undertaking from an applicant for an injunction, and the requirement of an injunction bond in

that court rests in the discretion of the judge, and the matter is governed by the principles and usages of equity, and the court may not only grant the injunction without a bond, but having required a bond, may nullify it by its decree, where it appears to the Court that the bond should not have been demanded.

Russell vs. Farley, 105 U. S. 441, *Bradley, J.*: "Since the discretion of imposing terms upon a party, as a condition of granting or withholding an injunction, is an inherent power of the Court, exercised for the purpose of effecting justice between the parties, it would seem to follow that, in the absence of an imperative statute to the contrary, the courts should have the power to mitigate the terms imposed, or to relieve from them altogether, whenever in the course of the proceedings it appears that it would be inequitable or oppressive to continue them. Besides, the power to impose a condition implies the power to relieve from it."

York in 1830, which provided that where no special provision was made by law as to security, the Vice-Chancellor, who allowed the injunction, should take from the complainant a bond to the party enjoined, either with or without sureties, in such sum as might be deemed sufficient, conditioned to pay the damages which the defendant might sustain by reason of the injunction, if the court should decide that the complainant was not entitled to the relief.⁷

This rule was subsequently carried into the New York Code of Procedure and has in general been followed in the codes and systems of other States, except that the discretion as to accepting bonds without sureties has for the most part been removed.

§180. Bonds for stay of execution or appeal.

In most jurisdictions a review of the higher court of the record made by the lower court is denominated an appeal, and a bond to stay execution or supersedeas is termed also an appeal bond, and while the Appellate Court passes upon the facts as well as the law, it is confined to the facts adduced in the lower court.⁸

The term "appeal bond" in some courts of general jurisdiction is accordingly used interchangeably with supersedeas. In some courts of limited jurisdiction, such as a magistrate's court, an appeal bond generally vacates the judgment, and provides a new trial in the Appellate Court.⁹

⁷ 1 Hoff. Ch. Pr. 80.

Cayuga Bridge Co. vs. Magee, 2 Paige 116-22.

⁸ Sharon vs. Hill, 26 Fed. Rep. 337.

In Ohio an appeal is distinct from a proceeding in error, and an appeal vacates the judgment or decree, and the case is retried in the Appellate Court on the same or substituted pleadings, and upon such evidence as may be offered, and the trial is in all respects the same as if it had not been carried on in the lower court. Under this practice,

appeal and supersedeas bonds are not interchangeable terms. *Mason vs. Alexander*, 44 O. S. 328; 7 N. E. 435.

⁹ Some confusion is likely to arise in failing to discriminate between an appeal—which is a retrial, where the case goes up from a court of limited jurisdiction, and an appeal which is a proceeding in error upon the record made in a court of general jurisdiction. The undertaking given in the former is a necessary step in perfecting the appeal, and is governed usually by strict statu-

An appeal, whether in the nature of a writ of error, or a retrial, is usually conferred by Statute as a matter of right, and the remedy, however groundless, except in certain special proceedings, can not be denied.¹⁰

tory conditions as to time of filing, and the amount of penalty, whereas an appeal which is in the nature of a writ of error, does not require an undertaking as a condition of a hearing in the reviewing court, the undertaking being merely to stay execution, and wholly disconnected from the right to prosecute error, the amount of the bond and sometimes even the requirement of any bond being discretionary in the trial court.

In its origin the proceeding in appeal was a technical practice, borrowed by equity from the civil law, by which the whole case was tried *de novo* upon new evidence, and without any reference to the conclusions reached in the inferior court, and was confined to causes in equity, ecclesiastical, and admiralty jurisdictions. But the modern statutory appeal, with the exceptions heretofore noted, differs only from the common law writ of error, in that the latter submits nothing for re-examination in the reviewing court but the law, while an appeal reviews both the law and the facts. *State vs. Doane*, 35 Neb. 707.

There is, however, no uniformity in the statutory appeal provided for in the several States. In North Carolina only matters of law are reviewed upon appeal, except where the action was originally cognizable in equity, in which case findings of fact are reviewable. *Baker vs. Belvin*, 122 N. C. 190; 30 S. E. 337.

The same effect is given appeal in Connecticut. *White vs. Howd*, 66 Conn. 264. While in Nebraska the higher court re-examines on appeal

the whole case, both in the law and facts. *Neb. L. & T. Co. vs. Lincoln*, etc., R. R. Co., 53 Neb. 246; 73 N. W. 546.

See also *Ex parte Henderson*, 6 Fla. 279; *Schirott vs. Philippi*, 3 Oregon 484.

The use of the term appeal in a double sense, sometimes meaning a retrial, and again a review, sometimes embracing a review of both the law and the facts, and again a review only of the law questions, is further complicated by the terms by which certain reviewing courts are designated. The court of last resort in Kentucky, Maryland, and New York is called "Court of Appeals." In Virginia, the "Supreme Court of Appeals." Intermediate courts in Illinois, Indiana and Texas, are termed "Appellate Courts," and the intermediate Federal Court "The United States Circuit Court of Appeals," and yet each of these courts entertain writs of error and statutory appeal, and are not in a technical sense courts of appeal exclusively as their names would indicate.

¹⁰ *McCreary vs. Rogers*, 35 Ark. 298; *Ricketson vs. Compton*, 23 Cal. 636; *State vs. Judge of Superior Dist. Ct.*, 28 La. Ann. 547; *People vs. Knickerbocker*, 114 Ill. 539; 2 N. E. 507; *Ridgely vs. Bennett*, 81 Tenn. 206.

The question of liability must be determined by the terms of the bond itself. Whether it is a statutory bond or a common-law bond or neither, is immaterial. A court has the inherent power to order a stay of its mandate, and in aid of such power has also the inherent power to require such bond as will enforce obedience to its order and protect the interest of the parties. The surety, however, cannot be held liable beyond the terms of the bond. *Southwestern Surety Ins. Co. vs. U. S. F. & G. Co.*, 75 Okla. 232; 182 Pac. 522.

§181. Statutory requirements as to appeal or stay bonds.

The statutes requiring bonds in appeal generally limit the time within which such bonds must be filed, and the Appellate Court acquires no jurisdiction in appeal, except upon a strict compliance with the Statute in this respect.¹¹ Although it is sometimes held that a substantial compliance with the law is sufficient.¹²

The provisions of Statute that bonds shall be approved by a designated officer are imperative, and the appeal may be dismissed for a non-compliance with such Statute,¹³ although the act of the officer in refusing to approve the bond may be reviewed.¹⁴

The appeal or stay bond must be conditioned according to law, otherwise the appeal can not be entertained. Where a Statute requires an appeal bond to recite that the "appeal shall be prosecuted with effect," and this condition is omitted, the appeal will be dismissed on motion,¹⁵ but the use of language which means substantially the same as the words employed in the Statute will be a sufficient compliance with the Statute.¹⁶

¹¹ *Mueller vs. Kelley*, 8 Col. App. 527; 47 Pac. 72; *Killian vs. Clark*, 111 U. S. 784; 4 S. Ct. 686; *Wormley vs. Wormley*, 96 Ill. 129; *Lengle vs. Smith*, 48 Mo. 276; *Canfield vs. City of Erie*, 21 Mich. 160; *Smithwick vs. Kelly*, 79 Tex. 564; 15 S. W. 486; *Pace vs. Ficklin*, 76 Va. 292; *Holcomb vs. Sawyer*, 51 Cal. 417.

¹² *Perkins vs. Shadbolt*, 44 Wis. 574. In this case the bond was not approved by the Court until a day after the expiration of the statutory limit, and it was considered a substantial compliance with the law.

In North Carolina the Statute gives the Court discretion to extend the statutory limit where it appears that the delay will not prejudice the appellee. *Harrison vs. Hoff*, 102 N. C. 25; 8 S. E. 887.

¹³ *Ingram vs. Greenwade*, 12 Ky. L. Rep. 942; *Keen vs. Whittington*, 40 Md. 489; *Gross vs. Bouten*, 9 Daly (N. Y.) 25; *Fogel vs. Dusault*, 141 Mass. 154; 7 N. E. 17; *Stebbins vs. Niles*, 21 Miss. 307; *Travis vs. Travis*, 48 Hnn 343; 1 N. Y. S. 357.

A failure to approve the bond according to law will not discharge the sureties, where the bond is acted upon, the provision of approval be-

ing considered as for the benefit of the obligee, and his failure to object is deemed a waiver. *Irwin vs. Crook*, 17 Col. 16; 28 Pac. 549; *Ryndak vs. Seawell*, 102 Pac. 125; 23 Okl. 759.

¹⁴ *Marsh vs. Cohen*, 68 N. C. 283; *Earle vs. Earle*, 49 N. Y. Super. Ct. 57.

¹⁵ *Swan vs. Hill*, 155 U. S. 394; 15 S. Ct. 158.

In Missouri the Statute requires the bond in appeal to recite a condition binding the obligor to comply with the decision of "any Appellate Court," and it was held insufficient to state in the bond that the appellant would comply with the decision of "The St. Louis Court of Appeals." *American Brewing Co. vs. Talbot*, 125 Mo. 388; 28 S. W. 585.

See also *Drinkwine vs. City of Eau Claire*, 83 Wis. 428; 53 N. W. 673.

¹⁶ *Riley vs. Mitchell*, 38 Minn. 9; 35 N. W. 472. The bond in this case recited that the appellant would prosecute her appeal "with due diligence to a final determination," and it was held to be a compliance with the statutory condition to "prosecute his appeal with effect."

See also *Anderson vs. Meeker Co. Com'rs*, 46 Minn. 237; 48 N. W.

Where an appeal bond is not in the express terms of the Statute, it may be valid as a common law obligation voluntarily entered into by the parties.^{16a}

A statutory requirement for the justification of sureties must be complied with, or otherwise the appeal is subject to dismissal.¹⁷ If the appeal is not dismissed, the sureties upon the bond will not be exonerated, because of a non-compliance with the Statute as to justification.

In New York the code provides that "an undertaking upon an appeal shall be of no effect unless it be accompanied by an affidavit of the sureties that they are each worth double the sum specified therein." And it was held that although a failure to comply with the requirement of the Statute would make the appeal irregular and would be a ground for dismissal, yet if the appeal was not dismissed, the irregularity would be no defense to the sureties.¹⁸

But where the sureties to an undertaking, given to stay proceedings on appeal, are excepted to, and they fail or refuse to justify, and justification is not waived by the respondent, the sureties are discharged from liability; the effect of the failure to justify is, by Statute, "the same as if the undertaking had not been given."^{18a}

It is held that an appeal will not be dismissed because of a failure of the sureties to justify where it is shown that the security is in fact sufficient.¹⁹

While a bond, if given for a smaller sum than required by Statute or the order of the Court is irregular, and constitutes ground for dismissal of the appeal,²⁰ yet it is not such a defect as will operate as a discharge of the surety if the appeal is prosecuted without objection.²¹

1022; *Gay vs. Parpart*, 101 U. S. 391; *Carmichael vs. Holloway*, 9 Ind. 519; *Robinson vs. Brinson*, 20 Tex. 438; *Kasson vs. Brocker*, 47 Wis. 79; 1 N. W. 418.

^{16a} *First State Bank v. Stevens Land Co.*, 119 Minn. 209; 137 N. W. 1101; *Pray v. Wasdell*, 146 Mass. 324; 16 N. E. 266; *Meserve v. Clark*, 115 Ill. 580; 4 N. E. 770; *Decker v. Decker*, 63 So. 24; 9 Ala. App. 241.

It has been held that the consideration of such common law undertaking is the perfection of the appeal and therefore failure to do so renders the bond unenforceable. *Pace Grocery Co. vs. Savage*, 114 S. W. 866.

¹⁷ *Harshaw vs. McDowell*, 89 N. C. 181; *Pencinse vs. Burton*, 9 Oregon 178.

¹⁸ *Hill vs. Burke*, 62 N. Y. 111.

See also *Murdock vs. Brooks*, 38 Cal. 596; *Moffat vs. Greenwalt*, 90 Cal. 368; 27 Pac. 296; *Ryndak vs. Seawell*, 102 Pac. 125; 23 Ore. 759; *Nichols & Shepard Co. vs. Horsted*, 130 N. W. 776; 27 S. D. 262.

^{18a} *Manning vs. Gould*, 90 N. Y. 476; *Riddle vs. MacFadden*, 112 N. Y. S. 498.

¹⁹ *St. Louis, L. & D. Ry. Co. vs. Wilder*, 17 Kan. 239.

²⁰ *Beaird vs. Russ*, 32 La. Ann. 304; *Scott vs. Milton*, 26 Fla. 52; 7 South. 32.

²¹ *Anderson vs. Rhea*, 7 Ala. 104.

The requirement of a Statute for a bond in appeal to be executed in double the amount of the decree and costs, will not be construed to invalidate the appeal where the penalty named exceeds the statutory requirement.²²

Statutes requiring the residence of the surety to be inserted in the bond, will, if not complied with, justify the approving officer in rejecting the bond, or possibly be ground of dismissal of the appeal, but the omission will not discharge the sureties.²³

Appeal or stay bonds are not invalidated because the persons signing as sureties are prohibited by law from signing in that

Dore vs. Covey, 13 Cal. 502. In this case the Court said that the statutory provisions as to the amount of the penalty are for the benefit of the obligee, and his failure to object must be considered a waiver. "Just as if the statute declared that no judgment should be rendered without service of process; but the defendant might waive the process or service. This waiver was made by the plaintiff below. He considered the appeal as regularly made, made no motion to dismiss, issued no execution, and suffered the undertaking to have the full effect of a regularly executed instrument."

Cain vs. Harden, 1 Oregon 360; *Jenkins vs. Skillern*, 5 Yerg. (Tenn.) 288; *Landa vs. Heermann*, 85 Tex. 1; 19 S. W. 885; *Sears vs. Seattle Consol. St. Ry. Co.*, 7 Wash. 286; 34 Pac. 918.

²² *Bentley vs. Dorcas*, 11 O. S. 398, *Gholson, J.*: "An objection is made to the form of the appeal bond, that the penalty is not precisely double the amount of the judgment or decree. . . . In an early case, it was said as to such a bond, that, 'There is no case where a bond fairly and regularly executed, and comprising substantially all the requisites of the stat-

ute, has been adjudged void because it departed, in some one or more particulars, from the exact words of the statute authorizing it to be taken. It has been the uniform object of our courts, to support bonds executed under the provisions of the law, where, by a reasonable interpretation, such bonds can be made to meet the intention for which they were required and taken.

"Where a party has had all the advantages of making the bond, the court can not aid him to avoid his obligations, by adopting strained and rigid maxims of construction." *Gardiner vs. Woodyear*, 1 Ohio 170, 177. . . . Assuming the costs to be correctly stated, the penalty of the bond exceeds double the amount of the decree and costs by a few cents. To hold that this error in ascertaining the penalty rendered the bond invalid, would, in view of the principle above stated, be unreasonable."

See also *Smith vs. Whitaker*, 11 Ill. 417.

Contra—*Johnson vs. Goldsborough*, 1 Harr. & J. (Md.) 499.

²³ *Dore vs. Covey*, 13 Cal. 502; *Murdock vs. Brooks*, 38 Cal. 596; *Van Deusen vs. Hayward*, 17 Wend. 67.

capacity. Rules of Court, or Statutes in many States, prohibit attorneys and non-residents from being accepted as sureties on judicial bonds. The approval of such prohibited parties as sureties is ground for dismissal of the appeal,²⁴ but the sureties will be held if the appeal is prosecuted.²⁵

Where the Statute provides that the Court shall fix the amount of the penalty in the bond, and the parties themselves fix the amount and the bond is executed accordingly, the statutory requirements will be deemed waived.²⁶ But if the bond recites that the amount of the penalty was fixed by the Court, all parties in interest will be estopped from showing otherwise.²⁷

Where the Statute requires more than one surety, a bond not conforming to this provision will be valid and binding upon the sole surety, if the purpose for which the bond was executed has been accomplished.²⁸

§182. Irregularities or defects whereby bonds are invalidated.

The distinction must be noted between such informalities in the Bond as merely give to the obligee the right to have the appeal dismissed, and those defects which invalidate the Bond itself.

The illustrations cited in the preceding section show that while a non-compliance with statutory requirements will be ground for the dismissal of the appeal, the bond itself is not on this account invalidated, in case the appeal is prosecuted. Since the obligor would be clearly estopped from pleading a non-compliance to statute, he having had all the benefit of an appeal.

If, however, the undertaking lacks the formality of a valid

²⁴ Sedgwick vs. Dawkins, 15 Fla. 572; Schnek vs. Hagar, 24 Minn. 339; Ulrich vs. Farrington Mfg. Co., 69 Wis. 213; 34 N. W. 89.

²⁵ McKellar vs. Peck, 39 Tex. 381; Ullery vs. Kokott, 61 Pac. Rep. 189; 15 Col. App. 138; 61 Pac. 189.

²⁶ Johnson vs. Noonan, 16 Wis. 687; Coughran vs. Sundbæk, 13 S.

D. 115; 82 N. W. 507; Braithwaite vs. Jordan, 5 N. D. 196; 65 N. W. 701.

²⁷ Ogden vs. Davies, 116 Cal. 32; 47 Pac. 772.

²⁸ Cochran vs. Wood, 29 N. C. 215; Allen vs. Kellam, 94 Pa. 253; B. & O. Ry. Co. vs. Vanderwarker, 19 W. Va. 265.

contract it can not be enforced, even though the appellant by reason of the acceptance of such bond has had all the benefit of the stay of execution provided for by law.

Where the bond contains no defeasance clause avoiding liability in case the appellant performs the order of the court, it is held that the undertaking is invalidated; such instrument is not a bond and can not be enforced.²⁹

So also where the name of the judgment creditor was omitted, and the name of another appellee was inserted, the latter being a stranger to the record, no recovery was had.³⁰

A bond will be void for want of consideration where there is no requirement of the law for an appeal bond. Thus where an administrator is exempted from giving a bond in appeal by reason of having already given an adequate bond as administrator, a bond executed notwithstanding the exemption will be void for want of consideration.³¹

Also where there is no necessity for a supersedeas by reason of an appeal bond operating as a stay of execution. The supersedeas will be void for want of consideration.³²

If an undertaking is given in pursuance of statute, and to attain a purpose authorized by statute, it is supported by sufficient consideration, but the absence of such authority in the law leaves the bond without consideration and void.³³

If the judgment appealed from is a nullity, as where the court rendering it had no jurisdiction, the bond will be wanting in consideration.³⁴

²⁹ Waller vs. Pittman, 1 N. C. 324.

³⁰ Block vs. Blum, 33 Ill. App. 643.

³¹ Buttlar vs. Davis, 52 Tex. 74; U. S. vs. Morris' Heirs, 153 Fed. 240.

But see Schumcker vs. Steidemann, 8 Mo. App. 302.

³² Powers vs. Chabot, 93 Cal. 266; 28 Pac. 1070; Olsen vs. W. H. Birch & Co., 1 Cal. App. 99; 81 Pac. 656.

³³ Ashley vs. Brasil, 1 Ark. 144; Steele vs. Crider, 61 Fed. Rep. 484; Brouty vs. Daniels, 23 Neb. 162; 36 N. W. 463; Travellers Insurance

Co. vs. Weber, 4 N. D. 135; 59 N. W. 529.

³⁴ Hessey vs. Heitkamp, 9 Mo. App. 36.

Contra—Tanquary vs. Bashor, 94 Pac. 22; 42 Col. 231.

But see Co-operative Assn. vs. Rohl, 32 Kan. 663; 5 Pac. 1. Holding that the sureties upon a judicial bond are estopped from denying jurisdiction. To the same effect see Stephens vs. Miller, 3 Ky. L. Rep. 523.

If the trial is had on appeal the validity of the judgment appealed

It has been held that the exaction of a bond in appeal which contains conditions more onerous than the law requires, renders the bond wholly void.³⁵ This rule can certainly be upheld to the extent of the excessive requirements.

A bond with a condition to pay judgment and costs when the latter only is required, is void for want of consideration as to the judgment.³⁶

If the appeal bond recites an appellate court which has no existence, the bond has been held void.³⁷

The ordinary defenses of suretyship apply to appeal bonds, and an unauthorized material alteration of the bond will discharge the sureties.³⁸

Where the act of a corporation becoming surety upon an appeal bond is *ultra vires*, the doctrine of estoppel does not apply, and the want of contractual capacity is considered a defense.³⁹

§183. Immaterial defects in the contract.

The law does not favor forfeitures, and unimportant defects in the form of the contract which do not of themselves affect the contractual relation of the parties will not be considered.

It is of no material consequence that the wrong date of the judgment is set out in the bond, if the contract in other respects describes correctly the judgment appealed from.⁴⁰ Where the

from cannot be raised, if the Appellate Court has jurisdiction. *Butler vs. Wadley*, 15 Ind. 502; *Knight vs. Waters*, 18 Iowa 345.

³⁵ *Newcomb vs. Worster*, 7 Allen 198; *Comm. vs. Wistar*, 142 Pa. 373; 27 Atl. 871; *Dennison vs. Mason*, 36 Me. 431. But see *Kountze vs. Omaha Hotel Co.*, 107 U. S. 378.

Bradley, J.: "We think the rule followed in some of the States is a sound one, that if the condition of an appeal bond, or bond in error substantially conforms to the requisitions of the statute, it is sufficient to sustain it, though it contain variations of language; and that if further conditions be added, the bond is not therefore invalid, so far as it is supported by the statute; but only as to the superadded conditions."

³⁶ *Halsey vs. Flint*, 15 Abb. Pr. (N. Y.) 367; *Post vs. Doremus*, 60

N. Y. 371; *Byrne vs. Riddell*, 4 La. Ann. 3.

³⁷ *Tucker vs. State*, 11 Md. 322.

Where the case is transferred after appeal to another county by reason of the fact that the judge in the county where the judgment was rendered was formerly a counsel in the case, the change of venue will not release the sureties, although the court affirming the judgment is not the one named in the condition of the bond, since the law on the subject of the change of venue is considered as being written into the bond. *Barela vs. Tootle*, 66 Pac. Rep. (Colo.) 899.

³⁸ *Anselm vs. Groby*, 62 Mo. App. 421.

³⁹ *Best Brewing Co. vs. Klassen*, 185 Ill. 37; 57 N. E. 20.

⁴⁰ *Handy vs. Burrton Land Co.*, 59 Kan. 395; 53 Pac. 67; *Pray vs. Wadsell*, 146 Mass. 324; 16 N. E. 266.

appellant's name is omitted from the bond, it is held competent to identify the parties by averment in the pleadings.⁴¹

The omission of the name of the Appellate Court,⁴² or the failure of some of the persons named as obligors to sign⁴³ are immaterial defects.

All informalities are deemed waived by failure to make timely objection.⁴⁴ The obligee can not stand upon the bond and at the same time object to its informalities. If he secures a dismissal of the appeal on the ground that the appellant has failed to comply with some statutory requirement, he can not thereafter maintain an action on the undertaking based upon a violation of the condition of prosecuting the appeal.⁴⁵

Issuing execution after the filing of an appeal bond is evidence that the obligee does not intend to waive the defects in the bond.⁴⁶

§184. Failure to perfect the appeal.

If a party fails to perfect his appeal, the bond is liable. Such default is within the express condition of the undertaking,

⁴¹ *Wile vs. Koch*, 54 O. S. 608; 44 N. E. 236. In this case a further defect in the bond was urged, in that the bond did not recite the amount of the penalty, the place for the insertion of such penalty being left blank. The bond, however, contained the stipulation "that the appellants if the judgment be adjudged against them on appeal, will satisfy such judgment and the costs." And it is held that the obligation thus expressly assumed was not defeated by failure to insert a definite amount in the undertaking. *Simmons v. Sharpe*, 56 So. 849; 2 Ala. App. 385.

⁴² *Stillings vs. Porter*, 22 Kan. 17.

⁴³ *Railsback vs. Greve*, 58 Ind. 72; *Davis vs. O'Bryant*, 23 Ind. App. 376; 55 N. E. 261; *Hentig vs. Collins*, 1 Kan. App. 173; 41 Pac. 1057; *Gleeson's Est.*, 192 Pa. 279; 43 Atl.

1032. See also *Ryndak vs. Seawell*, 102 Pac. 125; 23 Okl. 759; *Brown vs. Melloon*, 170 Iowa 49; 152 N. W. 75, Ann. Cas. 1917C. 1070, and note.

⁴⁴ *Jones vs. Drönerberger*, 23 Ind. 74; *Allen vs. Kellam*, 94 Pa. 253.

⁴⁵ *Columbia, etc., R. R. Co. vs. Braillard*, 12 Wash. 22; 40 Pac. 382. "We think that by refusing to accept the bond as sufficient, and by taking proceedings to have it determined ineffectual for the purposes of an appeal, the respondent is not entitled to judgment against the sureties. Here the appeal is dismissed because the sureties upon the bond are found insufficient, and we think it inconsistent that respondent should be permitted to treat it as an effectual obligation after it has secured an adjudication that is not such."

⁴⁶ *State vs. Sixth Judicial Dist. Ct.*, 22 Mont. 449; 57 Pac. 89, 145; *Hemmingway vs. Poncher*, 98 N. Y. 281.

which provides that the appellant will prosecute his appeal to effect.

If the appeal is dismissed for want of jurisdiction in the Appellate Court, or for omissions in matters antecedent to the appeal, the bond will not be held, for the failure to perfect the appeal under these circumstances is not the fault of the appellant.⁴⁷

The consent of the obligee to perfect an appeal after the date limited by law will waive the default, and the sureties will be held.⁴⁸

Recitals in the bond that the appeal has been perfected will estop the obligors from claiming otherwise.⁴⁹

Where the plaintiff in error gave bond in stay of execution conditioned that he would "prosecute his petition in error to effect," and failed to make his co-defendants in the lower court parties in the reviewing court, the question was raised whether after an affirmance of the judgment, the bond was liable, since the error proceeding was not perfected according to law by reason of the defect of parties; it was held: "The consideration of their bond — the stay of execution — has been obtained by them; and its condition — that he would prosecute his petition in error to effect, or that he would pay the judgment if it should be affirmed — has not been fulfilled. It is not for him or his sureties, in a collateral matter which in no way affects the rights of other parties to the judgment, to deny that the judgment has been affirmed by denying the jurisdiction of the court to which he himself appealed as a court having jurisdiction. On every principle of justice he is estopped from so doing, and the estoppel should be applied wherever it is practical without injuriously affecting the rights of others."⁵⁰

⁴⁷ Gregory vs. Obrian, 13 N. J. L. 11.

See also Wheeler vs. McCabe, 47 How. Pr. (N. Y.) 283.

⁴⁸ Carroll vs. McGee, 25 N. C. 13.

⁴⁹ Thalheimer vs. Crow, 13 Col. 397; 22 Pac. 779; Mix vs. People, 86 Ill. 329; Meserve vs. Clark, 115

Ill. 580; 4 N. E. 770; Fearons vs. Wright, 6 Ky. L. Rep. 747.

⁵⁰ Bulkley vs. Stephens, 29 O. S. 620.

See also In re Kennedy, 129 Cal. 384; 62 Pac. 64; Cresswell vs. Herr, 9 Col. App. 185; 48 Pac. 155; Rodman vs. Moody, 14 Ky. L. Rep. 202;

§185: Conditions upon which appeal or stay bonds become payable.

In general, a bond becomes payable upon the affirmance of the judgment or decree, or where a re-trial is had in the Appellate Court, upon the entering of a judgment against the appellant. Such affirmance or judgment must be a final order and of such character that the plaintiff may have execution upon it.⁵¹

It is not sufficient that the case has been tried in the Appellate Court and the docket entries in favor of the prevailing party entered. There must be an actual entry on the record of an affirmance, or an action upon the bond will be premature.⁵²

Where the Appellate Court enters an original judgment, it was held not sufficient averment in an action upon the bond to allege that the judgment appealed from had been "affirmed."⁵³ Neither is a sufficient cause of action stated by the allegation that the appellant has failed to prosecute his appeal with effect. An inference that the judgment has been affirmed is readily drawn from such allegations, but a cause of action upon the bond can not be founded upon an inference.⁵⁴

If the principal may further contest any of the points reserved, the condition of the bond is not broken even though the judgment is affirmed in part. Thus where the condition of the bond was to satisfy the judgment, "if the judgment or any part thereof be affirmed," and the appeal was from a judgment and an order denying a new trial, and it was shown that the order as to the new trial was affirmed, it was held insufficient to charge the bond, there being no showing that the judgment was affirmed.⁵⁵

Flannagan vs. Cleveland, 44 Neb. 58; 62 N. W. 297.

⁵¹ Parnell vs. Hancock, 48 Cal. 452; Jordan vs. Agawam Woollen Co., 106 Mass. 571.

⁵² Heath vs. Hunter, 72 Me. 259.

But see Perkins vs. Klein, 62 Ill. App. 585. Where it is held not to be necessary as a basis of an action upon an appeal bond to file a certified copy of the affirmance.

See also Buchanan vs. Milligan,

125 Ind. 332; 25 N. E. 349. To the effect that a presumption of the filing of a certified copy of affirmance arises after the trial in the Appellate Court.

⁵³ O'Neil vs. Nelson, 22 Ill. App. 531.

⁵⁴ Malone vs. McClain, 3 Ind. 532; Daggitt vs. Mensch, 141 Ill. 395; 31 N. E. 153.

⁵⁵ McCallion vs. Hibernia Sav'g Soc., 83 Cal. 571; 23 Pac. 798.

Yet where there is a distinct affirmance of a part of the relief granted in the lower Court and the decree or judgment is capable of separation, the bond will be held *pro tanto* if it is written to cover "whatever judgment may be rendered."⁵⁶ An affirmance for a less amount than the original judgment will, under this form of bond, constitute a breach.⁵⁷ Also where the appeal was taken from an order sustaining an attachment and from a judgment upon the debt, and the judgment is affirmed but the order of attachment reversed, it was held to constitute a breach of the bond.⁵⁸

An affirmance as to one or more of the parties, and a reversal as to others, constitutes a breach of the bond.⁵⁹

A bond to stay execution on a judgment pending a writ of error, the condition of which obligates the surety "to pay the said judgment and costs if the same is not reversed" and to "prosecute its writ of error to effect and pay and satisfy such judgment as shall be rendered against it thereon," obligates the surety to satisfy the final judgment rendered on the writ of error, and the obligation is not discharged by a reversal of the judgment which is followed by a rehearing and an affirm-

⁵⁶ *Harding vs. Kuessner*, 172 Ill. 125; 49 N. E. 1001; *Holmes vs. Steamer Bell Air*, 5 La. Ann. 523.

⁵⁷ *Hopkins vs. Orr*, 124 U. S. 510; 8 S. Ct. 590.

But see *Heinlen vs. Beans*, 71 Cal. 295; 12 Pac. 167; *Feemster vs. Anderson*, 6 T. B. Mon. (Ky.) 537.

Deatherage vs. Sheidley, 50 Mo. App. 490. Holding that an appeal from a decree upon a mechanic's lien wherein the decree was affirmed in part and released in part did not constitute a breach of the bond.

⁵⁸ *Krone vs. Cooper*, 43 Ark. 547.

See also *Oakley vs. Van Noppen*, 100 N. C. 287; 5 S. E. 1. In this case the condition of the appeal was "if, upon said appeal, the said ruling is affirmed, and said alleged lien declared and held valid," the ruling was affirmed, but the decree did not in terms hold the lien valid. This was considered a substantial affirmance, and to constitute a breach of the bond.

To the same effect see *Foster vs. Epps*, 27 Ill. App. 235.

But see *Rice vs. Rice*, 13 Ind. 562. This was a judgment for divorce with a decree for alimony in the

sum of \$200 and for a part of defendant's land. The Reviewing Court substituted a decree for \$3,200 and released the land, and it was held not to be such an affirmance as would bind the sureties for the \$3,000 added by the Court to the decree.

⁵⁹ *Porter vs. Singleton*, 28 Ark. 483; *Alber vs. Froelich*, 39 O. S. 245 (overruling *Lang vs. Pike*, 27 O. S. 498); *McFarlane vs. Howell*, 91 Tex. 218; 42 S. W. 853; *Brown vs. Conner*, 32 N. C. 75; *Vandyke vs. Weil*, 18 Wis. 277; *Lewis vs. Maulden*, 93 Ga. 758; 21 S. E. 147; *Wood vs. Orford*, 56 Cal. 157; *Ives vs. Hulea*, 17 Ill. App. 35; *Gilpin vs. Hord*, 85 Ky. 213; 3 S. W. 143; *Lutt vs. Sterrett*, 26 Kas. 561; *Johnson vs. Reed*, 47 Neb. 322; 66 N. W. 405; *Hood vs. Mathis*, 21 Mo. 308; *Reynolds vs. White*, 118 N. Y. S. 977; *Farmer's Loan & Trust Co. vs. Lord*, 41 Okl. 569; 139 Pac. 278; *Schultz vs. United States Fidelity & Guaranty Co.*, 201 N. Y. 230; 94 N. E. 601.

Cook vs. Ligon, 54 Miss. 625. In this case the judgment below was against the defendant individually

ance, since the opinion on rehearing is the final judgment.^{59a}

Where the party appeals to protect a special interest which does not concern his co-defendants, and the judgment generally as to the others is affirmed, but reversed as to the appellant, the bond will not be held for the part of the decree which is affirmed.⁶⁰

The addition of a new party in the Appellate Court and the entering of a judgment against both the original and the new party is considered an affirmance within the terms of the bond.⁶¹

§186. Same subject — Affirmance by failure to prosecute appeal.

A dismissal of an appeal for want of prosecution is a constructive affirmance of the lower court, as it leaves the parties bound by the judgment as originally entered and it will be deemed a breach of the conditions of the bond.⁶²

A dismissal for want of jurisdiction in the Appellate Court is not equivalent to an affirmance. The distinction has been stated as follows: "A dismissal of a writ of error for want of prosecution when the court has jurisdiction of the case, has always been treated as an affirmance of the decree or judgment within the meaning of the usual conditions of such bonds. But the rule must be different where the court has no jurisdiction in the premises. It is for the obvious reason that the court has

and as executor. It was reversed as to the individual liability and affirmed as to the representative capacity. Held a breach of the bond.

See also *Dignowitty vs. Staacke*, 25 S. W. (Tex. Civ. App.) 824. Where the appeal was from a judgment against a principal and surety and there was also a judgment in the same action in favor of the surety against the principal. The judgment against the principal and surety was affirmed, but reversed as to the judgment in favor of the surety. This was considered sufficient affirmance to hold the bond. In *Grieff vs. Kirk*, 17 La. Ann. 25, it was held that a judgment against partners affirmed as to one partner did not constitute a breach of the bond.

^{59a}*Culver vs. Fidelity & Deposit Co.*, 149 Mich. 630; 113 N. W. 9.

⁶⁰*Warner vs. Cameron*, 64 Mich. 185; 31 N. W. 42.

⁶¹*Helt vs. Whittier*, 31 O. S. 475. *Contra—Haberer vs. Hansen*, 148 Ill. App. 83.

⁶²*Long vs. Sullivan*, 21 Colo. 109; 40 Pac. 359; *Sutherland vs. Phelps*, 22 Ill. 92; *Coon vs. McCormack*, 69 Iowa 539; 29 N. W. 455; *Chase vs. Beraud*, 29 Cal. 138; *Simonds vs. Heinn*, 22 La. Ann. 296; *Commonwealth vs. Green*, 138 Mass. 200; *Flannagan vs. Cleveland*, 44 Neb. 58; 62 N. W. 297; *Teel vs. Tice*, 14 N. J. L. 444; *Blair vs. Sanborn*, 82 Tex. 686; 18 S. W. 159; *Callbreath vs. Coyne*, 109 Pac. 428; 48 Col. 199.

"That the appeal was dismissed on appellant's own motion and without prejudice" does not prevent a state of facts calling for a different conclusion. *Koelling vs. Wachsming*, 174 Ill. App. 322.

Contra—Kimball Print'g Co. vs. Southern Land Improvement Co., 57 Minn. 37; 58 N. W. 868.

no jurisdiction to pronounce a judgment of affirmance, and it would be a *non sequitur* to say a court may affirm a decree when it has no jurisdiction to hear the case for any purpose.”⁶³

A failure to prosecute an appeal arising from no fault of the appellant will not constitute a constructive affirmance, such as the allowance of an injunction against the appellant restraining him from proceeding with the appeal.⁶⁴

Where the Legislature in pursuance of a constitutional amendment created a new Court of Appeals to which pending cases were removed, and finally affirmed in the court to which they were transferred, the sureties upon the bond were released on the ground that it was no fault of the parties that the appeal was not prosecuted in the court to which it was originally sent, and that it was not within the power of the Legislature to impose new conditions upon the undertaking of the sureties without their consent and thus validate as to them an affirmance in a court not named in their contract.⁶⁵

An affirmance entered by consent of parties as a compromise or settlement of a controversy will not constitute a breach of the bond, since bonds are executed upon the implied condition that the matters would be submitted to judicial determination.⁶⁶

⁶³ Blair vs. Reading, 103 Ill. 375.

But see Swofford Bros. vs. Livingston, 65 Pac. Rep. 413.

⁶⁴ Planter's Bank vs. Hudgins, 84 Ga. 108; 10 S. E. 501.

⁶⁵ Schuster vs. Weiss, 114 Mo. 158; 21 S. W. 438, *Gantt, J.*: “This power of the State to change the mode of proceeding in its courts, so long as it does not impair the obligation of the contract, is too well settled to be brought in question. And where a remedy equally efficacious is afforded to the suitor, he cannot be heard to complain. So here, while the legislature deprived the suitor of a hearing in the Court of Appeals, it at the same time secured him a hearing in the court of last resort in the State. But it is

altogether a different proposition as to his sureties. They are not parties to the suit. They are obligors in a collateral undertaking. They entered into a private contract and agreed to be bound on certain conditions. Over their contract was the protection of the Constitution. That contract was made with reference to the law as it then stood. In the light of that law it must be read. After it was made it was secure from any act of the legislature, or amendment to the Constitution impairing its obligations.”

See also Cranor vs. Reardon, 39 Mo. App. 306; Trader vs. Sale, 18 O. C. C. 814.

⁶⁶ Johnson vs. Flint, 34 Ala. 673; Osborn vs. Hendrickson, 6 Cal. 175.

This has been so held even though the compromise was made in good faith.⁶⁷ A collusive compromise is unquestionably fraudulent and will release the surety. An agreement to abide a

⁶⁷ *Ross vs. Ferris*, 18 Hun 210; *Shimer vs. Hightshue*, 7 Black. (Ind.) 238.

Foo Long vs. Amer. Surety Co., 146 N. Y. 251; 40 N. E. 730, *Andrews, J.*: "The undertaking was to pay the judgment if it should be affirmed, or the appeal should be dismissed, and this, under the circumstances, referred to an affirmance or dismissal in an ordinary course of judicial procedure, and not an affirmance or dismissal by consent of parties. The plaintiff was entitled to proceed in this appeal according to the usual practice. He could take an affirmance of the judgment by default if the practice of the court permitted that to be done. But to construe the undertaking as permitting the parties to agree upon the judgment to be rendered would subject a surety to a hazard which could not, we think, have been contemplated. . . . It would sacrifice substance to form to hold that an affirmance obtained in this way was an affirmance within the true meaning of the undertaking. It was an affirmance by the act of the parties, and not in any true or real sense an affirmance by judgment of the court. It was not the judicial sentence upon the rights of the parties contemplated by the undertaking. The question of fraud or collusion is not presented."

Contra—Drake vs. Smythe, 44 Iowa 410; *Quillen vs. Quigley*, 14 Nev. 215; *First State Bank vs. Stevens Land Co.*, 119 Minn. 209; 137 N. W. 1101; *Chase vs. Berand*, 29 Cal. 138; *Bailey vs. Rosenthal*, 56 Mo. 385; *Howell vs. Alma*, 36 Neb. 80; 54 N. W. 126.

Ammons vs. Whitehead, 31 Miss. 99, *Handy, J.*: "The bonds were executed for the purpose of having the cases retried in the Circuit Court, and their legal effect was to give that court jurisdiction to determine the cases, and to render judgment, if necessary, against both the principal and the sureties. Their condition was, substantially, that if the judgments should be there affirmed, they would abide by and perform the judgment of the Court to be rendered thereon. From their very nature, the obligation of the sureties was contingent and uncertain. They were given for the express purpose of enabling the principal to carry on the litigation; and in the event that it would be unsuccessful, the law under which they were given provided that the judgment should be rendered against both the principal and the sureties. Even if the sureties are not to be considered bound as parties to the judgment, so as to be debarred of the right to complain in a collateral proceeding of what was done in the proceeding, the necessary legal effect of their execution of the bonds was to confer upon the principal the full power to do whatever he might deem necessary and proper in defending or determining the suits in the Circuit Court. The principal might have withdrawn all defense and submitted to judgments in the three cases immediately upon their presentation in the Circuit Court; and upon the same reason was authorized to compromise the suits upon terms advantageous to himself. This was no violation of the obligation of the sureties, nor variation of the terms of their obligation; for

test case is not a compromise, but in a full sense an affirmance by the court and will create a liability against the bond.⁶⁸

If the appeal has been dismissed and thereafter reinstated by agreement of the parties, it has been held that the sureties are liable upon a subsequent affirmance.⁶⁹ The sureties would be liable upon the constructive affirmance resulting from the dismissal, and the reinstatement would be an advantage rather than otherwise to the sureties as affording an opportunity for a possible reversal.

Want of capacity to prosecute the appeal is a breach of the bond. Thus where an affirmance was set aside upon the discovery that the appellant corporation had been dissolved before filing the writ of error, the constructive affirmance resulting from the inability and failure to prosecute error was deemed a breach of the bond.⁷⁰

§187. As to when action may be brought upon bond for appeal.

A cause of action will generally arise upon an appeal bond immediately upon affirmance, unless it is postponed by some act of the obligee inconsistent with such right.

If the obligee has levied execution upon personal property of the principal, it is held no action can be brought upon the bond until the execution has been disposed of in the manner provided by law.⁷¹

But a levy upon land is said to be no bar to an action upon the bond since such a levy does not deprive the principal either of the possession or use of the land, pending the enforcement of

that was entirely contingent and uncertain, except that the parties had, by the necessary legal effect of the act, submitted themselves to whatever might be done in the determination of the suit, by their principal, under the sanction of the court."

⁶⁸ Succession of Simonds, 26 La. Ann. 319.

⁶⁹ Bailey vs. Rosenthal, 56 Mo. 385. "It has never been held in

this State, that sureties in an appeal bond are parties to the suit, in the sense that they must be consulted in regard to any step taken in the case before final judgment."

⁷⁰ Texas Trunk Ry. vs. Jackson, 85 Tex. 605; 22 S. W. 1030.

⁷¹ Smith vs. Hughes, 24 Ill. 270; First Nat. Bank vs. Rogers, 13 Minn. 407; Clerk vs. Withers, 2 Ld. Raym. 1072.

the writ, and is not a satisfaction of the judgment.⁷² Except where required by Statute or the express terms of the bond, it is not necessary to first cause execution to issue against the principal before proceeding against the bond.⁷³

Where the bond was to secure an appeal from a special judgment for taxes, which judgment became a lien upon the land of the defendant, but did not become a personal obligation, it was considered that the liability against the surety was not fixed until execution had been first issued, as such a step was necessary in order to show a non-satisfaction.⁷⁴

It is not necessary to first make a demand upon the principal before proceeding against the surety upon an appeal bond.⁷⁵ Neither can the sureties require an obligee to first resort to other securities in his possession.⁷⁶

Summary action upon appeal bonds may be resorted to where the Statutes make such bonds a part of the record, and a separate action need not be instituted, but the Appellate Court enters judgments against the sureties at the time the judgment is affirmed against the appellant.⁷⁷ This is founded on the proposition that such sureties, by the act of signing the bond, become voluntary parties to the suit and subject themselves thereby to the decree of the Court.^{77a} It is held that a judg-

⁷² Mayo vs. Williams, 17 O. 244. "There is a great difference between a levy upon goods and a levy upon land. The goods are taken from the possession of the owner by the levy, but the owner of the land remains in possession after the levy, and cannot be dispossessed until after the land is sold."

Herrick vs. Swartwout, 72 Ill. 340; Robinson vs. Brown, 82 Ill. 279.

⁷³ Murdock vs. Brooks, 38 Cal. 596; Steinhauer vs. Colmar, 11 Colo. App. 494; 55 Pac. 291; Staley vs. Howard, 7 Mo. App. 377; Trogden vs. Cleveland Stone Co., 53 Ill. App. 206; Ayers vs. Duggan, 57 Neb. 750; 78 N. W. 296; Wallerstein vs. Amer. Surety Co., 15 N. Y. Suppl. 954; Babbitt vs. Finn, 101 U. S. 7; Fuller vs. Aylesworth, 75 Fed. Rep. 694; Sandoval vs. U. S. F. & G. Co., 100 Pac. 816; 12 Ariz. 348; Banker's Surety Co. vs. Security Trust Co., 39 App. D. C. 354.

⁷⁴ Hunt vs. Hopkins, 83 Mo. 13.

⁷⁵ Bell vs. Walker, 54 Neb. 222; 74 N. W. 617; Teel vs. Tice, 14 N. J.

L. 444; Fowler vs. Gordon, 5 Ky. L. Rep. 332; Nelson vs. Donovan, 16 Mont. 85; 40 Pac. 72; Bolles vs. Bird, 12 Colo. App. 78; 54 Pac. 403.

⁷⁶ Bingham vs. Mears, 4 N. D. 437; 61 N. W. 808; Cox vs. Mulhollan, 6 Mart. (La.) 649; Davis vs. Patrick, 57 Fed. Rep. 909; Mix vs. People, 86 Ill. 329; Day vs. McPhee, 93 Pac. 670; 41 Col. 467.

⁷⁷ Callahan vs. Saleski, 29 Ark. 216; Hawley vs. Gray Bros. Paving Co., 127 Cal. 560; 60 Pac. 437; Shannon vs. Dodge, 18 Colo. 164; 32 Pac. 61; Kiernan vs. Cameron, 66 Miss. 442; 6 South. 206; Lowe vs. Riley, 57 Neb. 252; 77 N. W. 758; Holbrook vs. Investment Co., 32 Oregon 104; 51 Pac. 451; Hickcock vs. Bell, 46 Tex. 610; Mayott vs. Knott, 92 Pac. 240; 16 Wyo. 108.

^{77a} Moore vs. Huntington, 84 U. S. 417; U. S. Surety Co. vs. American Fruit Co., 40 App. D. C. 239.

Beall vs. New Mexico, 16 Wall. 535, Bradley, J.: "A party who enters his name as surety on an appeal bond does it with a full knowledge of the responsibilities incur-

ment by summary process may be entered against the surety even though no notice is given him.⁷⁸

In an action on an appeal bond, evidence of the Appellate Court's judgment against the principal is conclusive against the sureties on the bond of such principal.^{78a}

§188. Measure of damages in an action upon an appeal or stay bond.

The amount of recovery upon a bond will be limited in any event to the amount which the law requires to be secured, and if a bond is executed for a sum in excess of that which the Statutes require, it will impose no liability for the excess, such excess of undertaking being void for want of consideration.⁷⁹

The amount recoverable will be further controlled by such express words of limitation as are recited in the bond.

If the condition is merely to satisfy the judgment appealed from, it will not cover the costs in the Appellate Court. Such costs can only be brought under the obligations of the bond by express stipulation or by a condition to perform the judgment of the Appellate Court, although it is held that a bond to pay the judgment of a lower court will cover the costs in that court, without express stipulation, since the costs are a part of the judgment.⁸⁰

So also, a bond conditioned to satisfy the decree or final order of the Appellate Court, is held not to include the costs of the lower court.⁸¹

A bond was conditioned that the "appellant shall diligently prosecute his appeal to effect and pay all damages and costs awarded against him on such appeal." The judgment of the

red. In view of the law relating to the subject it is equivalent to a consent that judgment shall be entered up against him if the appellant fails to sustain his appeal. If judgment may thus be entered on a recognizance, and against stipulators in admiralty, we see no reason in the nature of things, or in the provisions of the Constitution, why this effect should not be given to appeal bonds in other actions, if the legislature deems it expedient. No fundamental constitutional principle is involved; no fact is to be ascertained for the purpose of rendering the sureties liable, which is not apparent in the record itself; no object (except

mere delay) can be subserved by compelling the appellees to bring a separate action on the appeal bond."

⁷⁸ Phelan vs. Johnson, 80 Iowa 727; 46 N. W. 68.

^{78a} Commonwealth of Pennsylvania vs. Fidelity & Deposit Co., 180 Fed. 292. See also Costello vs. Bridges, 142 Pac. 687.

⁷⁹ Ante Sec. 199.

⁸⁰ Johnson vs. Ward, 21 Ky. L. Rep. 783; 53 S. W. 21; Many vs. Sizer, 6 Gray 141.

⁸¹ Michie vs. Ellair, 60 Mich. 73; 61 N. W. 1020. But see Expanded Metal Co. vs. Bradford, 177 Fed. 604, where it was held that on appeal from the U. S. Circuit Court

lower court was reversed in the Appellate Court, but the appellee then appealed to the Supreme Court, where the judgment of the Appellate Court was reversed and that of the trial court affirmed. It was held that the bond was liable only for the costs in the Appellate Court and not for those in the Supreme Court.^{81a}

A bond given on appeal from an order overruling a motion to vacate the appointment of a receiver, and requiring appellants to prosecute the appeal with effect, or "pay all the costs which have accrued in the court below," binds the surety for costs involved in the subject-matter of the appeal, and not for the costs accrued in the main suit.^{81b}

If the Statute points out the requirements for a bond in appeal, and the bond omits some of these requirements, they will be supplied by the intendment of the law, and recovery had for the amount the Statute requires.⁸²

Where the subject matter of the action is within the control of the court, as in the case of the foreclosure of a mortgage or mechanic's lien, or an action to set aside a fraudulent conveyance where the property is held by a receiver, the law does not require the substitution of a bond for the property pending a review in the Appellate Court. The undertaking in such cases does not cover the amount of the original decree, but only such costs and damages as result from the proceeding in error. This is usually regulated by Statute and the bond carries no larger liabilities than the Statute contemplates.^{82a}

The Federal Statutes limit the liability upon foreclosure appeal bonds in cases where the appeal stays execution to "all damages and costs." This is held to cover only the costs in the Appellate Court, and such deterioration and waste of the property as results from the delay incident to the appeal, and does

to the Circuit Court of Appeals, a surety on a bond for costs is liable not only for the costs in the Appellate Court, but also for those incurred in the court below.

^{81a} Breed vs. Weed, 130 Wis. 264; 110 N. W. 197.

^{81b} American Surety Co. vs. Koen, 107 S. W. 938; 49 Tex. Civ. App. 98.

⁸² Chandler vs. Thornton, 4 B. Mon. (Ky.) 360; Gilpin vs. Hord, 85 Ky. 213; 3 S. W. 143.

In Indiana the Statute specifically provides that omissions of statutory requirements for appeal

bonds will not relieve the sureties from those requirements. *Stults vs. Zahn*, 117 Ind. 297; 20 N. E. 154.

But see *Boulden vs. Estey*, 92 Ala. 182; 9 South. 283. Where the bond was conditioned for the payment of costs only, although the Statute required a bond to cover costs and damages, and it was held that the liability on the bond was limited to its exact language.

^{82a} *Lauder vs. Hunter*, 142 N. W. 251; 32 S. D. 108; *Marean vs. Stanley*, 34 Col. 91; 81 Pac. 759; *Supervisors vs. Kennicott*, 103 U. S. 554.

not cover the original decree nor interest pending appeal, nor rents and profits upon the land.⁸³ The Statute in some of the States requires the appellant in foreclosure to execute a bond conditioned to pay the debt.⁸⁴

Where no personal judgment is rendered in an action of fore-

⁸³Kountz vs. Omaha Hotel Co., 107 U. S. 378; 2 S. Ct. 911, *Bradley, J.* (p. 392): "The plaintiff, in this case, was not entitled to possession, nor to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing—the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him as of right. The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him. Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not covered by reasonable insurance, and the like, probably might also be fairly covered by the bond. But perception of rents and profits is the mortgagor's right, until final determination of the right to sell, and the sale is made accordingly. The mere delay of the sale for the purposes of an appeal does not operate to the legal injury of the mortgagee. It does not suspend execution for the debt. . . . As it is the specific thing, the land itself, and not the rents and profits that constitutes the pledge, and delay of sale caused by the appeal, as before said, deprives the mortgagee of no legal right. It may be an incidental disadvantage or inconvenience, but in our judgment it is not a legal damage contemplated by the appeal bond."

Miller, J. (dissenting), p. 400: "In all cases of insolvent mortgagors the rule, as construed by the Court,

offers a strong inducement to keep the mortgagee out of his money as long as possible, without interest, or any other compensation for the delay. An insolvent corporation—a railroad company, for instance—makes default in its mortgage bonds, which amount to twice the value of the property mortgaged. A decree is obtained for its sale, and before a receiver can be appointed, the directors take an appeal, give a small bond, little more than the probable costs, and then use the road for three years, making millions of dollars out of it with which to pay debts subsequent to the mortgage, or distribute among interested parties. No more striking instance of its injustice is needed than the case before us. A decree for money largely in excess of the value of the hotel mortgage is stayed by a bond for \$50,000, under which the defendant, an utterly insolvent corporation, receives rent, or uses the property to the value of \$38,000, while it litigates without a shadow of right, in this court for three years, and appropriates this \$38,000 to its own use, and is not held responsible for this, though the bond expressly mentions *'the use and detention'* of the property as one of the liabilities incurred, if the corporation fails to make good its plea."

See also, as supporting the view that rents and profits cannot be recovered upon an appeal and foreclosure. *Wood vs. Fulton*, 2 Harr. & G. (Md.) 71; *Hutton vs. Lockridge*, 27 W. Va. 428; *Burgess vs. Doble*, 149 Mass. 256; 21 N. E. 438. It is held that a bond for stay of execution upon a decree setting aside a fraudulent conveyance covers the rents and profits pending the appeal. *Killfoil vs. Moore*, 45 S. W. (Tex. Civ. App.) 1024.

⁸⁴Whan vs. Erwin, 27 La. Ann. 706.

See also *Marchand vs. Frellsen*, 105 U. S. 423, construing the Louisiana Statutes.

closure, no recovery can be had upon the appeal bond for the deficiency.⁸⁵

In an appeal from an order foreclosing a mechanic's lien, it was held that the sureties were not liable for the deficiency, since the owner, in any event, was not liable beyond the proceeds of the property covered by the lien.⁸⁶ The same rule applies and for the same reason where a junior mortgagee appeals. The limit to which any decree can operate against him is to order the deduction from the fund, as a prior claim, of the full amount of the senior mortgage.⁸⁷ And to the same effect where a subsequent attaching creditor⁸⁸ or a person holding in a trust or representative capacity appeals, the latter in no event should thereby incur a liability beyond the value of the assets belonging to his trust.⁸⁹

An appeal from an order of ejectment will in general obligate the sureties for the rents and profits during the time the appellee is kept out of possession by reason of the appeal.⁹⁰

⁸⁵ *Hinkle vs. Holmes*, 85 Ind. 405; *Berryhill vs. Keilmeyer*, 33 Iowa 20; *Knapp vs. Van Etten*, 55 Hun 428; 8 N. Y. S. 415; *Mississippi Val. Trust Co. vs. Somerville*, 85 Mo. App. 265. But see *Rogers v. Minneapolis Threshing Mach. Co.*, 48 Wash. 19; 95 Pac. 1014.

⁸⁶ *Sosman vs. Conklin*, 65 Mo. App. 319; *Mareau vs. Stanley*, 34 Col. 91; 81 Pac. 759. See also *Copeland vs. Dixie Lumber Co.*, 57 So. 124; 4 Ala. App. 230.

⁸⁷ *Willson vs. Glenn*, 77 Ind. 585.

⁸⁸ *Friedman vs. Lemle*, 38 La. Ann. 654.

⁸⁹ *Lunsford vs. Baskins*, 6 Ala. 512; *Fitzpatrick vs. Todd*, 79 Ky. 524.

Contra—*Yates vs. Burch*, 87 N. Y. 409, *Danforth, J.*: "Although it should be conceded that the original judgment could have been enforced against the defendants therein only to the extent of assets in hand, after payment of prior claims, the concession would not aid the defendants here. Their promise or undertaking

was upon sufficient consideration, and by reason of it the judgment-creditors were prevented from pursuing such property as might be in possession of the judgment-debtors, or marshalling the assets; they can not therefore successfully urge that the judgment could not have been collected. The considerations now advanced for the purpose, and also set out in the answer, might have availed upon an application to the court below to dispense with or limit the security to be given upon appeal, but after an unsuccessful appeal, cannot avail against the security in fact given, and which may well be construed as an admission of the possession of sufficient assets to pay the judgment."

See also *Schmumcker vs. Steidemann*, 8 Mo. App. 302.

⁹⁰ *Cahall vs. Citizens Mut. Bldg. Assn.*, 74 Ala. 539; *Miller vs. Vaughn*, 78 Ala. 323; *Hays vs. Wilstach*, 101 Ind. 100; *Adams vs. Gilchrist*, 63 Mo. App. 639; *Gleeson's Est.*, 192 Pa. 279; 43 Atl. 1032; *St.*

Attorney fees in resisting an appeal are not recoverable as damages upon the bond.⁹¹

It has been held that the bond is liable for nominal damages, although the appellant pays the judgment and costs upon affirmance.⁹²

The bond will be liable for the judgment of the Appellate Court, even though the amount is in excess of the judgment appealed from.⁹³

Where the judgment in the Appellate Court is rendered against both the principal and surety, and the amount of it with costs exceeds the penal sum named in the bond, such judgment as against the surety is erroneous.⁹⁴

Interest can be recovered as damages for the detention of the payment of the penalty after it becomes due, and in an action upon an appeal bond, the judgment appealed from together with interest may be recovered, even though the addition of the interest increases the amount beyond the penalty named in the bond, and the interest period begins to run from the time the surety should have paid, which would be the time of demand, and the bringing of the action is sufficient demand.⁹⁵

Louis Smelting Co. vs. Wyman, 22 Fed. Rep. 184; *Norton vs. Davis*, 13 Tex. Civ. App. 90; 35 S. W. 181; *Tarpey vs. Sharp*, 12 Utah, 333; 43 Pac. 104.

An appeal in an action to quiet title does not charge the appellant upon the bond for the rents and profits accruing during his possession pending appeal. *Carver vs. Carver*, 115 Ind. 539; 18 N. E. 37.

⁹¹ *Kellogg vs. Howes*, 93 Cal. 586; 29 Pac. 230; *Noll vs. Smith*, 68 Ind. 188; *Deisher vs. Gehre*, 45 Kas. 583; 26 Pac. 3; *Williams vs. Fidelity & Deposit Co.*, 42 Col. 118; 93 Pac. 1119; *Higgins vs. J. I. Case Threshing Mach. Co.*, 144 N. W. 1037; 95 Neb. 3.

Contra—*Shows vs. Pendry*, 93 Ala. 248; 9 South. 462; *Simmons vs. Sharpe*, 56 So. 849; 2 Ala. App. 385; *Wheeler vs. Fuller*, 58 So. 792; 4 Ala. App. 532.

⁹² *George vs. Bischoff*, 68 Ill. 236.

⁹³ *Cooper vs. Rhodes*, 30 La. Ann. 533.

⁹⁴ *Zeigler vs. Henry*, 77 Mich. 480; 43 N. W. 1018.

But see *Tyson vs. Sanderson*, 45 Ala. 364. Where it is held that a recovery can be had for the full amount of a guardian's bond and the costs of the action in addition.

See also *State vs. Homey*, 44 Wis. 615.

⁹⁵ *Ives vs. Merchant's Bank*, 12 How. 159; *Crane vs. Andrews*, 10 Colo. 265; 15 Pac. 331.

Whereatt vs. Ellis, 103 Wis. 348; 79 N. W. 416, *Marshall, J.*: "It was an ancient doctrine, and is still followed to some extent in England, that the penalty in a penal bond limits the amount of recovery however much the actual damages of the obligee may be. . . . In accordance with the great weight of

§189. Successive appeal bonds.

Where a bond in appeal or stay of execution is given in an action in which a prior bond in appeal or stay has been executed, such as where an appeal has been taken to an intermediate court, and a further appeal is taken to a court of last resort, these successive bonds are cumulative and a final affirmation fixes the liability upon both bonds.⁹⁶

As between the several sets of sureties, the last are the principal obligors, and the first are in the relation of sureties for them.⁹⁷

American authority the judicial rule here, as to interest, is that when the damages for the breach of a penal bond exceed the penalty, the obligee is entitled to interest on the penalty, the interest period, however, to be controlled by the right of the obligee to interest upon the damages against the principal. That is to say, when the circumstances are such that the principal is chargeable with interest on the damages accruing from the breach of a bond and such damages are equal to or exceed the penalty, the interest period on such penalty will commence at the same time as that against the principal on such damages. When the bond is breached under this rule, the penalty, to the amount of the damages, immediately becomes the debt of the sureties and bears interest, the same in all respects as any other debt due on contract, if the principal claim bears interest."

See also *Nat. Bank vs. Baker*, 58 Ill. App. 343; *Devol vs. Dye*, 6 Ind. App. 257; 33 N. E. 253.

⁹⁶ *Church vs. Simmons*, 83 N. Y. 261; *Chester vs. Broderick*, 131 N. Y. 549; 30 N. E. 507; *Shannon vs. Dodge*, 18 Col. 164; 32 Pac. 61; *Becker vs. People*, 164 Ill. 267; 45

N. E. 500; *Boaz vs. Milliken*, 4 Ky. L. Rep. 700; *Coonradt vs. Campbell*, 29 Kan. 391; *Moore vs. Lassiter*, 16 Lea (Tenn.) 630; *Howard Ins. Co. vs. Silverberg*, 89 Fed. Rep. 168.

Babbitt vs. Finn, 101 U. S. 7, *Clifford, J.*: "Where the bond is given in a subordinate court to prosecute an appeal to effect in a superior court, the sureties become liable if the judgment is affirmed in the superior court; nor are they discharged in case the judgment of the superior court is removed into a higher court for re-examination and a new bond is given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction, but the reversal of the judgment in some court having jurisdiction to correct the alleged error."

⁹⁷ *Hinckley vs. Kreitz*, 58 N. Y. 583; *Case Note*, 6 L. R. A. (N.S.) 1021.

Wronkow vs. Oakley, 133 N. Y. 505; 31 N. E. 521. In this case the second set of sureties paid the judgment, and took an assignment of it, held—"Upon the affirmance of the judgment by the latter court the sureties on the last appeal bond

Where a new trial was granted upon a proceeding in error, and upon retrial the same judgment is rendered, upon which error is prosecuted, it is held that the first bond remains liable.⁹⁸ So also if the judgment is reversed on appeal, and upon further appeal such judgment of reversal is reversed and the original judgment affirmed, the first bond is liable.⁹⁹

If an additional bond is given in the same action, in pursuance of an order of court, the liability upon both bonds is concurrent, and a joint action upon the bonds may be prosecuted.¹⁰⁰

§190. Defenses in actions upon appeal bonds — Estoppel.

The sureties upon an appeal bond are estopped from all collateral attack upon the judgment appealed from. All issuable facts necessary to the validity of the judgment are conclusively settled by the judgment and its affirmance, and any fact which was necessarily determined in the action in which the judgment was rendered, can not be put in issue in an action upon a bond.¹⁰¹

took an assignment of the judgments, and in their hands there was no longer any liability on the part of the sureties on the first appeal. Such sureties became, on the giving of the second undertaking to pay the judgments, sureties for the second sureties, and when the second sureties paid or discharged their obligation to the owner of such judgments and took an assignment of them, they could not enforce them against the first sureties."

⁹⁸ Lowry vs. Tew, 25 Hun 257; Barela vs. Tootle, 66 Pa. Rep. (Col.) 899.

⁹⁹ Carroll vs. McGee, 25 N. C. 13; Robinson vs. Plimpton, 25 N. Y. 484; Crane vs. Weymouth, 54 Cal. 476.

But see Stoll vs. Padley, 100 Mich. 404; 59 N. W. 176, where the bond was conditioned to pay such judgment as should be rendered in

the intermediate court and the intermediate court rendered no judgment, but reversed the lower court, a subsequent reversal of the intermediate court was held to impose no liability upon the bond.

To the same effect see Nofsinger vs. Hartnett, 84 Mo. 549.

¹⁰⁰ Hargis vs. Mayes, 20 Ky. L. Rep. 1965; 50 S. W. 844.

¹⁰¹ Butler vs. Wadley, 15 Ind. 502; Pierce vs. Banta, 9 Ind. App. 376; 31 N. E. 812; Hydraulic Press Brick Co. vs. Neumeister, 15 Mo. App. 592; Keithsburg & E. R. R. vs. Henry, 93 Ill. 255; McCarthy vs. Chimney Construction Co., 219 Ill. 616; 76 N. E. 850; Iroquois Mfg. Co. vs. Annan-Burg Milling Co., 161 S. W. 320; 179 Mo. App. 87.

West vs. Carter, 129 Ill. 249; 21 N. E. 782. In this case the judgment appealed from was upon a gambling debt, and the surety de-

The sureties are not estopped from showing fraud and collusion in obtaining the judgment appealed from.¹⁰²

The want of jurisdiction in the Appellate Court will not avail the sureties where the judgment has been affirmed on appeal.¹⁰³

In general the sureties are estopped from asserting any defense which contradicts the recitals of the bond, such as that the judgment appealed from had never been entered,¹⁰⁴ or that the order of the court in reference to the appeal was not complied with.¹⁰⁵

Where the appeal is entertained and the judgment affirmed, the sureties will be estopped from showing that some statutory requirement necessary to the perfecting of the appeal was omitted.¹⁰⁶

§191. Appeal from a justice court.

An appeal from a Justice Court to a court of record vacates all the judgments and orders entered by the magistrate, and the case is retried in the Appellate Court the same as if originally begun there. This is a right expressly conferred by statute,

fends upon the ground that the judgment, and the bond to secure its appeal, were void on that account, held—"In no sense can appellee be said to be a person 'interested,' either in the original contract or in the judgment rendered thereon by the justice of the peace, within the contemplation of the section of the statute quoted. In respect to this judgment, he was a mere volunteer, who, at the instance of the defendant, voluntarily obligated himself to pay the judgment rendered against his principal, by said justice, and all costs occasioned by the appeal, in case the appeal was dismissed by the Circuit Court, as we have seen was done. It cannot affect the standing of appellee, or discharge his obligation, that his principal might, either at law or in equity, have avoided the judgment."

See also *Watson vs. Johnson*, 13 Ky. L. Rep. 336.

¹⁰² *Piercy vs. Piercy*, 36 N. C. 214; *Supreme Council vs. Boyle*, 15 Ind. App. 342; 44 N. E. 56.

Contra—*Krall vs. Libbey*, 53 Wis. 292; 10 N. W. 386.

¹⁰³ *Hathaway vs. Davis*, 33 Cal. 161.

¹⁰⁴ *Parrott vs. Kane*, 14 Mont. 23; 35 Pac. 243; *American Bonding Co. vs. Rudolph*, 127 Pac. 133; 53 Col. 389.

But where in the case appealed the obligee has appeared in court and asserted that he had obtained no judgment and thereby caused the appeal to be dismissed, the sureties upon the appeal bond are not thereafter estopped to deny the existence of the judgment recited in the bond given by them. *Linville vs. McDowell*, 127 Ill. App. 303.

¹⁰⁵ *Meserve vs. Clark*, 115 Ill. 580; 4 N. E. 770.

See also *Duntermann vs. Storey*, 40 Neb. 427; 58 N. W. 949; *Healy vs. Newton*, 96 Mich. 228; 55 N. W. 666.

¹⁰⁶ *Ante* Sec. 201; *Gudtner vs. Kilpatrick*, 14 Neb. 347; 15 N. W. 708; *Flannagan vs. Cleveland*, 44 Neb. 58; 62 N. W. 297; *Love vs. Rockwell*, 1 Wis. 382.

and is unknown to the common law, and is in force in nearly all the States.

The statutory provisions for stay of execution in the Justice Court, for the most part, relate to the suspension of the right of execution without conferring a right of review in the Appellate Court, although the statutes of the various States provide also for a petition in error to the higher court, with or without bond.

The statutory requirements as to the time within which appeal bonds can be filed are mandatory, and the filing of a bond after this limitation has expired gives the Appellate Court no jurisdiction, and creates no liability on the bond.¹⁰⁷

Where the statute provides that the appellant shall give bond conditioned to pay the judgment below, if the appeal is dismissed, and the bond merely recites that he will pay the judgment of the Appellate Court, the requirement of the statute becomes a part of the bond by intendment of the law, and if the appeal is not prosecuted, the sureties will be held.¹⁰⁸

§192. Bonds to procure injunction.

As a general rule the extraordinary relief by injunction will not be granted, except upon the condition that the plaintiff execute a bond either to the defendant or the State for the use of the defendant, conditioned to pay such damages as result in case it is finally decided that the injunction ought not to have been granted.

Nearly all the States have now so provided by Statute, and

¹⁰⁷ *McCarthy vs. Holden*, 54 Kan. 313; 38 Pac. 261; *Martin vs. Croker*, 62 Iowa 328; 17 N. W. 533; *Brown vs. Mo. Pac. Ry. Co.*, 85 Mo. 123.

Contra—*Adams vs. Thompson*, 18 Neb. 541; 26 N. W. 316.

¹⁰⁸ *Lux vs. McLeod*, 19 Col. 465; 36 Pac. 246. In Ohio the Statute requires a bond for appeal from the judgment of a justice of the peace to contain the conditions "that the appellant will prosecute his appeal

to effect, and without unnecessary delay, and that if judgment is adjudged against him on the appeal, he will satisfy such judgment and costs." Sec. 6584 R. S. O.

These conditions were held to be indispensable to the appeal, and where the condition as to prosecuting the appeal to effect was omitted, it was considered sufficient ground for dismissal of the appeal. *Job vs. Harlan*, 13 O. S. 485.

such statutes generally make the injunction order inoperative until the undertaking is furnished.¹⁰⁹

Where the statute does not expressly provide for an undertaking as the condition of an injunction, a Court of Equity will require the plaintiff to give a bond in all cases where there is any reasonable probability that the injunction will expose the defendant to damages.¹¹⁰

No recovery for damages can be had against a plaintiff who secures an injunction except upon his special promise or bond, unless circumstances are such as to warrant an action for malicious prosecution. A party may invoke all the remedies provided for by law for the enforcement of his rights without incurring a liability for damages for so doing. The bond which the law provides as a condition precedent to an injunction, is therefore, the only recourse of the defendant, if he has been damaged by a wrongful injunction.

The surety upon an injunction bond does not, like the ordi-

¹⁰⁹ *State vs. Rush Co. Com'rs*, 35 Kan. 150; 10 Pac. 535; *Diehl vs. Friester*, 37 O. S. 473; *Miller vs. Parker*, 73 N. C. 58.

In South Carolina, the Statute (Sec. 6194) provides that "the Court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the Court shall finally decide that plaintiff was not entitled thereto." This statute is not construed as an imperative requirement for a bond before an injunction can become operative, and it is held that an injunction allowed without a bond is valid if the bond is thereafter given within a reasonable time. *Meinhard vs. Youngblood*, 37 S. C. 223; 15 S. E. 947.

¹¹⁰ *Macon & B. R. R. Co. vs. Gibson*, 85 Ga. 1; 11 S. E. 442, *Bleckley, C. J.*: "A court of equity, or a court of law in the exercise of equitable functions, may, and should always impose just terms as a condition to its interference by interlocutory injunction in behalf of suitors. The granting and continuing of an injunction is not a matter of strict right in the parties, but of sound discretion in the judge or the court.

"In the exercise of such discretion, it seems highly inexpedient to hold one of the parties to the litigation absolutely bound, while the other party remains perfectly free. This would have the appearance of subjecting the former to the will or even the caprice of the latter."

See also *State vs. Wakely*, 28 Neb. 431; 44 N. W. 488; *Smith vs. Kuhl*, 26 N. J. Eq. 97.

nary promisor in suretyship, agree to pay the debt of another, and his undertaking is not collateral to a promise or obligation of his principal, except in cases where the principal also signs the bond, or in some other way obligates himself to respond to the damages resulting from his injunction.

The United States Supreme Court has held "without a bond for the payment of damages or other obligation of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. It is only by reason of the bond, and upon the bond, that he can recover anything."¹¹¹

§193. When action for damages upon an injunction bond accrues.

No cause of action arises upon an injunction bond until it is finally determined that the injunction ought not to have been granted. This determination must be by a judgment of the court, or something equivalent thereto.

A dismissal of an action without prejudice because some of the defendants were not served, is held not to constitute a breach

¹¹¹ *Meyers vs. Block*, 120 U. S. 211; 7 S. Ct. 525.

Hayden vs. Keith, 32 Minn. 277; 20 N. W. 195, *Vanderburgh, J.*: "The plaintiffs contend that when the Court, pursuant to the statutes, orders the writ to issue, the right to the actual damages accrues as an incident to the allowance and issuance of the process, whether a bond is filed or not, and that in case a bond with sureties is filed, as required by the statute, it is to be regarded simply as a further or additional security for such damages. We are unable to assent to this. The bond is not cumulative, but the only security of the defendant in the injunction suit."

See also *Asevado vs. Orr*, 100 Cal. 293; 34 Pac. 777; *Harless vs. Consumers' Gas Trust Co.*, 14 Ind. App.

545; 43 N. E. 456; *Manlove vs. Vick*, 55 Miss. 567; *Campbell vs. Carroll*, 35 Mo. App. 640; *Palmer vs. Foley*, 71 N. Y. 106; *Mark vs. Hyatt*, 135 N. Y. 306; 31 N. E. 1099.

In the case of *Newark Coal Co. vs. Upson*, 40 O. S. 25, it was held—"It may now be considered the approved doctrine, that, an action for malicious prosecution of a civil suit may be maintained, whenever, by virtue of any order, or writ, issued in the malicious suit, the defendant in that suit has been deprived of his personal liberty, or of the possession, use, or enjoyment, of property of value. The name, or form, of the writ, or process, is immaterial. It may be an order of arrest, or of attachment, or of injunction.

"The malicious prosecutor cannot shield himself behind the interlocu-

of the bond, as it is not thereby determined that no injunction should have been allowed.¹¹²

But a dismissal of an action for want of prosecution is such a final determination as amounts to a finding that the injunction ought not to have been granted, there being no express reservation of a right to institute a further action upon the same cause.¹¹³

So also a voluntary dismissal by the plaintiff, while not a determination by the court of the merits of the question as to whether the plaintiff was entitled to the injunction allowed, yet it is equivalent to a judgment, since the court would be justified in finding that by the act of dismissal, the plaintiff admits that he is not entitled to the injunction.¹¹⁴

But an agreement by the parties that an injunction shall be dismissed, releases the sureties, since in effect it is a waiver by the defendant of his right to damages.¹¹⁵

Where the action of the court, dissolving an injunction, is based upon some facts or circumstances arising after the allowance of the writ, such dismissal has no relation to the merits of the issues upon which the injunction was originally granted, and it is not a judicial determination that the writ was wrongfully issued, and hence, does not constitute a breach of the bond.¹¹⁶

tory order of the judge, based upon his own malicious, *ex parte* application and affidavit."

¹¹² *Krug vs. Bishop*, 44 O. S. 221.

But see *Yale vs. Baum*, 70 Miss. 225; 11 South. 879; *Mitchell vs. Sullivan*, 30 Kan. 231; 1 Pac. 518.

¹¹³ *Penniman vs. Richardson*, 3 La. 101; *Whitehead vs. Tulane*, 11 La. Ann. 302; *Manufacturers' & Traders' Bank vs. Dare*, 67 Hun. 44; 21 N. Y. S. 806; *Kane vs. Casgrain*, 69 Wis. 430; 34 N. W. 241; *Dowling vs. Polack*, 18 Cal. 625.

The rights and liabilities of the parties to the injunction bond are fixed when it is determined that the injunction ought not to have been granted. *Berkey Co. vs. Sylvania Co.*, 97 Ohio St. 73, 119 N. E. 140.

¹¹⁴ *Frahm vs. Walton*, 130 Cal. 396; 62 Pac. 618; *Alliance Trust Co. vs. Stewart*, 115 Mo. 236; 21 S. W. 793; *Sharpe vs. Harding*, 65 Mo. App. 28; *Pacific Mail S. S. Co. vs. Lenling*, 7 Abb. Pr. (N. S.) 37; *Pacific Mail S. S. Co. vs. Toel*, 85 N. Y. 646; *Roach vs. Gardner*, 9 Gratt. 89; *Mayor of East Lake vs. De Vore*, 53 So. 1018; 169 Ala. 237.

¹¹⁵ *Large vs. Steer*, 121 Pa. 30; 15 Atl. 490; *Prefontaine vs. Richards*, 47 Hun. 418.

¹¹⁶ *Apollinaris Co. vs. Venable*, 136 N. Y. 46; 32 N. E. 555. In this case after the preliminary injunction was allowed, the plaintiff was adjudged to be in contempt of court, and as a punishment, the Court directed that the complaint be dismissed and the injunction dissolved.

Thus where pending a final hearing of an action in which a temporary injunction had been allowed, the defendant died, and on that account the injunction was dissolved and the action dismissed, it was held that the representatives of the deceased defendant had no cause of action on the bond.¹¹⁷

Where the form of the bond is to respond in damages "provided the injunction is dissolved" and does not recite the more usual condition with reference to a judicial finding as to the merits of the grounds upon which the writ was issued, it is im-

Andrews, J.: "We are of the opinion that the dismissal of the complaint and the dissolution of the injunction under the circumstances stated, did not, either in fact or in law, constitute an adjudication that the plaintiff was not entitled to the preliminary injunction in the action. That question was not before the court, and was not and could not have been decided in the contempt proceedings. The undertaking related to the right of the plaintiff to a temporary injunction at the commencement of the action, and the obligation assumed by the sureties was to pay damages in case the Court 'finally decides that the plaintiff was not entitled thereto.'

"The sureties upon such an undertaking may be held in some cases, although there has been no formal adjudication against the right to the temporary injunction. Where the plaintiff *ex parte*, and without the consent of the defendants, enters an order vacating the injunction and discontinuing the action, this is equivalent to an adjudication that the plaintiff was not entitled to the injunction when granted. The purpose of requiring an undertaking would be thwarted if in such a case the sureties were not held. (*Pacific Mail S. S. Co. vs. Toel*, 85 N. Y. 646.)

"It would seem, upon the same principle, that if the case was dismissed upon the application of the defendant for want of prosecution, the inference should be indulged that no right to an injunction existed when it was issued, and the dismissal should be treated as an adjudication against the right.

"But where, as in the present case, the defendants secure a dismissal of

the action, and a dissolution of the injunction upon some matter arising subsequent to the commencement of the action and having no relation to the merits, either directly or by inference, it would, we think, be contrary to the natural or reasonable interpretation of the transaction to hold that the dismissal was a determination by the court that the plaintiff, at the time the temporary injunction was issued, 'was not entitled thereto,' and especially would it be contrary to principle to so adjudge against the sureties in the undertaking."

See also *Palmer vs. Foley*, 71 N. Y. 106; *Worden vs. Klag*, 13 Ohio C. C. 627. In the case last cited the injunction restrained the party from proceeding upon an action in ejectment pending in a justice court awaiting the determination of an equitable action in another court, the justice court not having equitable jurisdiction. The equity case being determined against the injunction plaintiff and the injunction dissolved, action was brought on the bond. The Court holds: "The party was compelled to resort to a court of equity to obtain relief in regard to matters that could not be set up as a defense in an action of detainer, and so the Court issued an injunction, and it was rightfully issued. She was rightfully in possession until after the decision of the Court. . . . It is not decided, and ought not to be decided, that the injunction was improperly issued. We think the plaintiff was entitled to the injunction until the decision of the case, and that there has been no breach of the condition of the bond."

¹¹⁷ *Johnson vs. Elwood*, 82 N. Y. 362.

material whether the order of dissolution is based upon facts arising before or after the allowance of the writ.¹¹⁸

Where the injunction is dissolved because of an insufficient bond, it constitutes a breach of the undertaking.¹¹⁹

A submission of a case to arbitration which results in a dismissal of the controversy and a dismissal of the injunction, does not constitute a breach of the bond. The agreement of the parties to abide by the arbitration, whether right or wrong, is a settlement of the issues without judicial determination and can not be substituted for a decision by the court that the injunction ought not to have been granted, it is in effect a dissolution by consent and a waiver of damages.¹²⁰

¹¹⁸ *Alliance Trust Co. vs. Stewart*, 115 Mo. 236; 21 S. W. 793.

¹¹⁹ *Betts vs. Mouglin*, 15 La. Ann. 52.

¹²⁰ *Columbus, Hocking Valley & Toledo Ry. Co. vs. Burke*, 54 O. S. 98; 43 N. E. 282, *Minshall, C. J.*: "In a decision by the Court the law requires that it shall conform to the law and the facts of the case, if it do not, by taking the proper steps, its judgment may be reversed by the proper tribunal at the suit of the party aggrieved. But such is not the case as to the award made by the arbitrators in this instance, under the agreement of submission between the parties. It is true that the issues of law and fact between the parties in the case were referred to the arbitrators to be heard and determined as a court. But whether they so heard the case or not, whether they erred both as to the law and the facts, no remedy was provided, and none could be had, however erroneous their award might be in point of law and fact. They heard the case as a *quasi* court at most, not as ministers of justice appointed by the law; and their judgment was to be, and is,

final and irreversible by any tribunal. If there had been a provision that the award should be made a rule of court, and subject to be set aside or confirmed by it on a review of the law and facts on which it was made to rest, there would be some ground for the argument, that it is the equivalent of the decision required by the bond. . . . When a plaintiff obtains an injunction by giving a bond to answer for such damages as may be caused the defendant by its allowance, and afterwards, voluntarily and without the consent of the defendant, dismisses his action, there is much reason for holding that he should be estopped to say, in an action on the bond, for the recovery of damages, that it has not been decided that the injunction ought not to have been granted. For, in such case, he, by his own act, has prevented the defendant from having such a decision. And such is the substance of the holding in the various cases cited by counsel for the defendant in error.

"But none are cited, and we have found none, that the same rule applies, where the dismissal is with the *consent* of the defendant.

A dissolution of an injunction as to a part of the relief prayed for in the writ,¹²¹ or as one of several parties enjoined,¹²² does not constitute a breach of the bond.

Even though the temporary restraining order has been dissolved upon motion, no action can be maintained on the bond, until a final determination of the cause in which the injunction was issued.¹²³

§194. Construction of bonds to procure injunction.

The liability of a surety upon an injunction bond is *stricti juris* and the form of the bond as well as all the elements essential to a valid contractual relation will be taken into account.

It is the bond, and not the order under which it was given, which constitutes the contract, and the language of the bond cannot be enlarged by reference to the terms of the order.^{123a}

There must be a consideration, and where the bond is given after the injunction has issued it lacks a valid consideration and the sureties are not liable.¹²⁴

So also if the penalty and conditions of the bond exceed the requirements of the statute, it will, to the extent of such excess, be inoperative for want of consideration.¹²⁵

Parol evidence cannot be received to remedy defects in the

"And there is not the same reason for holding that it should. In such case the defendant has an opportunity to insist that, before the dismissal is had, the court determine whether the injunction ought to have been granted, so that an action may be prosecuted on the bond, if such is his purpose. If he fails to do this, and consents to the dismissal of the action, his conduct is consistent with the inference that he intends to waive any right he may have on the bond."

¹²¹ Walker vs. Pritchard, 34 Ill. App. 65.

Contra—Pierson vs. Ells, 46 Hun 336.

In Crawford vs. Atlantic Coast Lumber Co., 89 S. C. 456; 71 S. E. 1049, it was held that where an injunction is sustained in part, the defendant is entitled to such damages under the injunction bond as he has suffered by reason of so much of the injunction order as has not been sustained.

¹²² Ovington vs. Smith, 78 Ill. 250.

Contra—Gray vs. South & North Alabama R. R. Co., 50 So. 352; 162 Ala. 262.

¹²³ Clark vs. Clayton, 61 Cal. 634; Kilpatrick vs. Haley, 6 Col. App. 407; 41 Pac. 508; Bank of Monroe vs. Gifford, 65 Iowa 648; 22 N.W. 913.

Cohn vs. Lehman, 93 Mo. 574; 6 S. W. 267. In this case the preliminary injunction was dismissed on motion, and on final hearing, the case was dismissed. An appeal was taken to the Federal Supreme Court, but without supersedeas, and it was held that the right of action on the bond was suspended during the appeal.

See also Yazoo & M. V. R. R. Co. vs. Adams, 78 Miss. 977; 30 South. 44.

Contra—Howard vs. Lindeberg, 2 Alaska 301; Gray vs. South & North Alabama R. R., 50 So. 352; 162 Ala. 262.

^{123a} American Exchange National Bank vs. Goubert, 210 N. Y. 421; 104 N. E. 928.

¹²⁴ Carter vs. Mulrein, 82 Cal. 167; 22 Pac. 1086.

¹²⁵ Lambert vs. Haskell, 80 Cal. 611; 22 Pac. 327.

form of the bond,¹²⁶ but words of doubtful meaning will be construed if possible to avoid a forfeiture.¹²⁷

The clerical omission of words which are necessary to complete the sense of the instrument, and which are obviously left out by mistake, will be supplied by construction, as for example, the omission of the word "dollars" from the penalty clause.¹²⁸

A recital in a bond that the injunction has been allowed is not conclusive of that fact, and the sureties are not estopped from showing that the order did not issue.¹²⁹

But it is held that the sureties are estopped from denying a recital in the bond that the injunction was issued on condition that the plaintiff execute the bond.¹³⁰

Where the bond contains a misrecital of material facts, but contains a reference to records in which the facts are correctly stated, the reference for the purpose of construction becomes a part of the bond itself.¹³¹

§195. Defenses of sureties upon injunction bonds.

The sureties, who by their bond, assist the plaintiff to invoke the extraordinary remedy of restraint upon the defendant will be estopped from claiming as a defense that the court issuing the writ had no jurisdiction,¹³² or that the writ was issued with-

¹²⁶ Copeland vs. Cunningham, 63 Ala. 394.

¹²⁷ Lambert vs. Haskell, 80 Cal. 611; 22 Pac. 327; Shreffler vs. Nadelhoffer, 133 Ill. 536.

¹²⁸ Harman vs. Howe, 27 Gratt. 676.

¹²⁹ Adams vs. Olive, 57 Ala. 249.

¹³⁰ Hamilton vs. State, 32 Md. 348.

¹³¹ Williamson vs. Hall, 1 O. S. 190.

¹³² Robertson vs. Smith, 129 Ind. 422; 28 N. E. 857. In this case it was conceded that the Court granting the injunction had no jurisdiction over the person of the defendant, and when sued upon the

bond the sureties claimed that the undertaking was void on that account. Held—"The question we must determine is whether the defendant in such action had the right to resist the making of the order and to apply to the courts for its dissolution, and after having successfully done so, hold the plaintiff upon his bond for the necessary expense incurred in the proceeding. If the contention of the appellees is the correct one, the position of a party against whom an injunction has been granted by a court of general jurisdiction is an embarrassing one. He must determine for himself whether the court has jurisdic-

out probable cause.¹³³

Where the prohibition of the writ is directed against the doing of an act which the defendant never intended to do, the injunction, for this reason, can do no injury to the defendant, and no recovery can be had on the bond.¹³⁴

Where the defendant was enjoined from negotiating a note and answered that he did not intend to negotiate the note, it was held that there could be no recovery on the bond as the defendant had not been injured.¹³⁵

It is no defense to an action upon an injunction bond that in another action involving the same issues the injunction was sustained.¹³⁶

tion to make the order. If, in addition to the proposition of law involved, there are disputes concerning the place of his domicile, he must, at his peril, determine how that question of law and fact will ultimately be decided. If he concludes that the court has not jurisdiction, and disobeys its order, he will be fined and imprisoned for contempt. If, on the other hand, he concludes to obey the order, and leave it to the court to determine the question of its validity, then, by it, he has no remedy. We have however much he may be injured arrived at the conclusion that neither reason nor the weight of authority will compel a litigant to occupy this anomalous position. An injunction cannot be granted without a bond. The agreement in the bond to pay damages resulting from it is clear and explicit. Damages must, from the nature of the case, result if the defendant is restrained from doing that which he has a right to do. He must resist the order, and must, by himself or counsel, defend himself against proceedings for contempt. He can not go his way as though no such order

had been granted, however invalid and unauthorized it may be. It can not fairly be said that he has an election to disregard the order, for he is put in a position where he must vindicate his rights, one way or another, before a court. This being true, it would seem remarkable that he should be required to do this at his own expense, when there is a bond given for the very purpose of protecting him from the wrongful action of the court."

Cumberland Coal & Iron Co. vs. Hoffman, 39 Barb. 16; City of Boise City vs. Randall, 66 Pac. Rep. (Idaho) 938; Loomis vs. Brown, 16 Barb. 325; Walton vs. Develing, 61 Ill. 201; Hanna vs. McKenzie, 5 B. Mon. 314; Adams vs. Olive, 57 Ala. 249; Littleton vs. Burgess, 91 P. 832; 16 Wyo. 58.

¹³³ Cox vs. Taylor's Adm., 10 B. Mon. 17; Hornback vs. Swope, 8 Ky. L. Rep. 533.

¹³⁴ Hayes vs. Chicago Gravel Co., 37 Ill. App. 19.

¹³⁵ Bank of Monroe vs. Gifford, 70 Iowa 580; 31 N. W. 881.

¹³⁶ Swan vs. Timmons, 81 Ind. 243.

Where an injunction bond is conditioned to pay all costs awarded against the plaintiff and all damages incurred, in case the injunction is dissolved, the bond remains in force until the case is finally disposed of on appeal, though the injunction was made permanent in the lower court and reversed on appeal.^{136a}

Obedience to the writ is not a condition of recovery on the bond; and disobedience cannot be set up as a defense to a suit on the bond.^{136b}

§196. Measure of damages for breach of injunction bond.

A recovery upon an injunction bond is limited to damages which flow directly from the restraining order, and although there has been a nominal infraction of the defendant's rights, unless it results in an injury, the bond is not liable.

Where the defendant was restrained from using the water of a ditch for irrigating his land, it was held that he was not entitled to recover on the bond after the dissolution of the injunction, it being shown that by reason of the scarcity of water, no benefit would have been received from the ditch had the injunction not been granted.¹³⁷

Damages resulting indirectly from the restraining order can not be recovered. Thus, where the owners of a stock of merchandise were enjoined from disposing of the same, the loss of profits was considered a remote damage, although it was shown that prior to the injunction order the business had made a large profit.¹³⁸ Also where a defendant was divested of his

^{136a} Columbia Amusement Co. vs. Pine Beach Inv. Co., 63 S. E. 1002; 109 Va. 325; Moore vs. Lachmund, 117 P. 1123; 59 Or. 565.

Contra—Houghton vs. Meyer, 208 U. S. 149; Webber vs. Wilcox, 45 Cal. 301; Lambert vs. Haskell, 80 Cal. 611; 22 Pac. 327.

^{136b} Phoenix Pad Co. vs. American Coat Co., 111 Md. 549; 75 Atl. 394; Colcord vs. Sylvester, 66 Ill. 540.

¹³⁷ Mack vs. Jackson, 9 Col. 536; 13 Pac. 542.

¹³⁸ Hibbard vs. McKindley, 28 Ill. 240; Chicago City Ry. Co. vs. Howison, 86, Ill. 215; Epenbaugh vs. Gooch, 15 Ky. L. Rep. 576.

See also Sensenig vs. Parry, 113 Pa. 115; 5 Atl. 11; Moorer vs. Andrews, 39 S. C. 427; 17 S. E. 948; Lewis vs. Collier, 47 So. 790.

property by an injunction and the appointment of a receiver, it was held that no recovery could be had on the injunction bond for damages resulting from the bad management of the receiver.¹³⁹

A plaintiff may recover damages for loss of his business resulting from an injunction, provided the business is an established one and has been operated for such a length of time that profits are ascertainable with reasonable certainty and definiteness.^{139a}

The depreciation in value of property withdrawn from the market by the injunction is a direct result of the restraint, and a proper subject of recovery on the bond.¹⁴⁰

Where the injunction results in the detention of money, the measure of damages is the legal rate of interest.¹⁴¹

If the collection of a judgment is enjoined, interest on the judgment may be recovered.¹⁴²

But it was held that where a sale of land upon execution was enjoined, that the plaintiff can not recover interest on the purchase price from the time of the injunction to the time of sale.¹⁴³

Loss of time and wages occasioned by injunction are a proper element of damages providing due diligence is used in seeking other employment.¹⁴⁴

So also where the defendant is under contract to pay salaries and wages to employees, and his business is suspended by the injunction, the bond is liable for the wages.¹⁴⁵

¹³⁹ Hotchkiss vs. Platt, 8 Hun 46; Lehman vs. McQuown, 31 Fed. Rep. 138; Wood vs. Hollander, 84 Tex. 394; 19 S. W. 551.

^{139a} Whitehead vs. Cape Henry Syndicate, 68 S. E. 263; 111 Va. 193; Lambert vs. Haskell, 80 Cal. 611; 22 Pac. 327.

¹⁴⁰ Meysenburg vs. Schlieper, 48 Mo. 426; Lallande vs. Trezevant, 39 La. Ann. 830; 2 South. 573; 5 South. 862; Dougherty vs. Dore, 63 Cal. 170; City of Clay Center v. Williamson, 100 P. 59, 79 Kans. 485.

¹⁴¹ Heyman vs. Landers, 12 Cal. 107.

¹⁴² Amis vs. Bank of Ky., 8 La. Ann. 441; Weatherby vs. Shackelford, 37 Miss. 559.

¹⁴³ Colby vs. Meservey, 85 Iowa 555; 52 N. W. 499.

But see Hill vs. Thomas, 19 S. C. 230.

¹⁴⁴ Muller vs. Fern, 35 Iowa 420.

¹⁴⁵ Wood vs. State, 66 Md. 61; 5 Atl. 476.

It was held where one is enjoined from the collection of debts, and the debts are barred by the Statute of Limitations pending the injunction, that the sureties upon the bond are liable for the amount of the debts so barred.¹⁴⁶ Mental strain and anxiety which the defendant suffers in consequence of the injunction are not a proper subject of damages.¹⁴⁷

Where the injunction operates to deprive the defendant of his right to the possession of land, the value of the use and occupation during the pendency of the writ, is an element of damages, and the measure of the use and occupation is the rental value,¹⁴⁸ or where the use of the land by the owner in his business can be made the subject of approximate computation, the recovery can be had for this amount.¹⁴⁹

§197. Same subject—Defendant's expenses in procuring a dissolution of injunction.

While a defendant can not recover compensation for the loss of his own time expended in procuring a dissolution of a wrongful injunction,¹⁵⁰ yet he may recover all actual and necessary

¹⁴⁶ Terrell vs. Fingersoll, 78 Tenn. 77.

¹⁴⁷ Cook vs. Chapman, 41 N. J. Eq. 152; 2 Atl. 286.

¹⁴⁸ Wadsworth vs. O'Donnell, 7 Ky. L. Rep. 837; Holloway vs. Holloway, 103 Mo. 274; 15 S. W. 536; Wood vs. State, 66 Md. 61; Rice vs. Cook, 92 Cal. 144; 28 Pac. 219; Hutchins vs. Munn, 209 U. S. 246.

¹⁴⁹ Edwards vs. Edwards, 31 Ill. 474; Silsbe vs. Lucas, 53 Ill. 479; Rutherford vs. Moore, 24 Ind. 311.

¹⁵⁰ Cook vs. Chapman, 41 N. J. Eq. 152; 2 Atl. 286, *Van Fleet, V. C.*: "There is such a thing known to the law as damage without injury, and this occurs where damage results from an act or omission which the law does not esteem an

injury. . . Every litigation requires more or less time and trouble. The law makes it the duty of litigants to be diligent and vigilant, but it has never been understood that a successful litigant was entitled, as against his adversary, to compensation for the time and attention which it was necessary for him to bestow upon the litigation."

See also Riggs vs. Bell, 42 La. Ann. 666; 7 South. 787; Curtiss vs. Bachman, 110 Cal. 433; 42 Pac. 910; Bartram vs. Ohio & Big Sandy R. Co., 141 Ky. 100; 132 S. W. 188; Edwards vs. Bodine, 11 Paige (N. Y.) 223.

Contra—Helmkamp vs. Wood, 85 Mo. App. 227.

disbursements in the matter of obtaining a judicial determination that the injunction should not have been granted.¹⁵¹

But the expenses incurred in an unsuccessful attempt to dissolve an injunction are not recoverable on the bond even though on final hearing the injunction is vacated.¹⁵²

Attorney fees expended in procuring a dissolution of an injunction are recoverable as damages on the bond.¹⁵³ Counsel fees for dissolution of an injunction are not allowed in the Fed-

¹⁵¹ Ten Eyck vs. Sayer, 76 Hun 37; 27 N. Y. S. 588; Bartram vs. Ohio & Big Sandy R. R. Co., 141 Ky. 100; 132 S. W. 188.

Contra—Midgett vs. Vann, 158 N. C. 128; 73 S. E. 801.

But see State vs. Graham, 69 S. E. 301; 68 W. Va. 1.

Alliance Trust Co. vs. Stewart, 115 Mo. 236; 21 S. W. 793. In this case the expenses of taking depositions in another State were allowed as damages upon the bond.

In Crounse vs. Syracuse C. & N. Y. R. R. Co., 32 Hun 497, the expenses of hiring a special train to take counsel to the place where the court was in session in order to obtain a dissolution of the injunction, was considered a proper item of damages, where large property interests were involved, which were put in peril by the injunction.

¹⁵² Curtiss vs. Bachman, 110 Cal. 433; 42 Pac. 910; Allen vs. Brown, 5 Lans. (N. Y.) 511; Lyon vs. Hersey, 32 Hun 253. Affirmed 100 N. Y. 641; 3 N. E. 797. But see State vs. Graham, 69 S. E. 301; 68 W. Va. 1.

¹⁵³ Bustamente vs. Stewart, 55 Cal. 115; Belmont Min. & Mil. Co. vs. Costigan, 21 Col. 465; 42 Pac. 650; Thomas vs. McDaniel, 77 Iowa

299; 42 N. W. 301; Colby vs. Messervey, 85 Iowa 555; 52 N. W. 499; Neiser vs. Thomas, 46 Mo. App. 47; Binford vs. Grimes, 26 Ind. App. 481; 59 N. E. 1085; Bush vs. Kirkbride, 30 Sou. Rep. (Ala.) 780; Nimocks vs. Welles, 42 Kan. 39; 21 Pac. 787; Cook vs. Chapman, 41 N. J. Eq. 152; 2 Atl. 286; City of Helena vs. Brule, 15 Mont. 429; 39 Pac. 456, 852; New Nat. Turnpike Co. vs. Dulaney, 86 Ky. 516; 6 S. W. 590; Weierhauser vs. Cole, 109 N. W. 301; 132 Ia. 14.

Contra—Oliphint vs. Mansfield, 36 Ark. 191; Sensenig vs. Parry, 113 Pa. 115; 5 Atl. 11; Jones vs. Rosedale St. Ry., 75 Tex. 332; 12 S. W. 998; Revell vs. Smith, 106 Pac. 863; 25 Okl. 508; Jones vs. Rountree, 74 S. E. 1096; 11 Ga. App. 181; Stringfield vs. Hirsch, 94 Tenn. 425; 29 S. W. 609; Midgett vs. Vann, 158 N. C. 128; 73 S. E. 801.

In Kentucky it is held that when the injunction is the only relief sought, and in fact gives the relief if sustained, no recovery for counsel fees can be had. Tyler vs. Hamilton, 108 Ky. 120; 55 S. W. 920.

Contra—Seese vs. Northway, 58 Iowa 187; 12 N. W. 258; State vs. Taylor, 68 S. E. 379; 67 W. Va.

eral Courts,¹⁵⁴ although recovery can be had in a State Court upon a bond filed in a Federal action.¹⁵⁵ It is held that attorney fees contracted for, but not actually paid, can be recovered.¹⁵⁶

Where the injunction is merely incidental to some other relief sought, and the injunction is dissolved as a part of the final disposition of the case, no recovery for attorney fees can be had on the bond.¹⁵⁷

Where the motion to dissolve is unsuccessful, attorney fees incurred in the preparation and hearing of such motion, can not

585; *Chicago A. & N. R. R. Co. vs. Whitney*, 121 N. W. 1043; 143 Ia. 506.

¹⁵⁴ "There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause." *Oelrichs vs. Spain*, 15 Wall. 211.

¹⁵⁵ *Mitchell vs. Hawley*, 79 Cal. 301; 21 Pac. 833; *Hannibal & St. J. R. R. Co. vs. Shepley*, 1 Mo. App. 254; *Wash vs. Lackland*, 8 Mo. App. 122; *Aiken vs. Leathers*, 37 La. Ann. 482.

Contra—*Tullock vs. Mulvane*, 184 U. S. 497.

Recovery of attorneys' fees in dissolving an injunction was allowed by the Supreme Court of Kansas against a bond filed in a Federal Court for the District of Kansas. In reversing the judgment

the Supreme Court of the United States held that "a bond given in pursuance of a law of the United States is governed, as to its construction, not by the local law of a particular State, but by the principles of law as determined by this court and operating throughout the courts of the United States."

¹⁵⁶ *Holthaus vs. Hart*, 9 Mo. App. 1; *Crouse vs. Syracuse C. & N. Y. R. R. Co.*, 32 Hun 497; *Wittich vs. O'Neal*, 22 Fla. 592; *Underhill vs. Spencer*, 25 Kan. 71; *Meaux vs. Pittman*, 35 La. Ann. 360; *Garrett vs. Logan*, 19 Ala. 344; *Lansley vs. Nietert*, 78 Iowa 758; 42 N. W. 635; *Noble vs. Arnold*, 23 O. S. 264; *Littleton vs. Burgess*, 91 P. 832; 16 Wyo. 58.

Contra—*Willson vs. McEvoy*, 25 Cal. 169; *Hooper vs. Patterson*, 32 Pac. Rep. (Cal.) 514.

In *Schening vs. Cofer*, 97 Ala. 726; 12 South. 414, it was shown that the services of counsel were rendered gratuitously, and it was held that no recovery for such services could be had on the bond.

¹⁵⁷ *Langworthy vs. McKelvey*, 25 Iowa 48; *Ady vs. Freeman*, 90 Iowa 402; 57 N. W. 879; *Bolling vs. Tate*, 65 Ala. 417; *San Diego Water Co.*

be recovered, although the injunction is finally dismissed.¹⁵⁸ Attorney fees in modifying an order of injunction can not be recovered on the bond.¹⁵⁹

The court will consider only the necessary counsel fees, and where several counsel are employed, no recovery can be had, except for such sum, and for such a number of counsel as seems to be reasonably necessary in resisting the injunction.¹⁶⁰

A municipality defending by its attorney, who is paid an annual salary, is not entitled to counsel fees by way of damages on the dissolution of the injunction. But where the city employs an associate counsel to assist its city attorney in the dissolution of the injunction, such associate counsel's fees may be recovered as damages under the bond.^{160a}

Where no motion is made to dissolve the injunction until the final hearing of the case on its merits, and the injunction is then dissolved, no recovery can be had for counsel fees.¹⁶¹

vs. Pac. Coast S. S. Co., 101 Cal. 216; 35 Pac. 651; Brown vs. Baldwin, 121 Mo. 126; 25 S. W. 863; Noble vs. Arnold, 23 O. S. 264; Livingston vs. Exum, 19 S. C. 223; Lamb vs. Shaw, 43 Minn. 507; 45 N. W. 1134; Tabor vs. Clark, 15 Col. 434; 25 Pac. 181; Chicago, A. & N. R. R. Co. vs. Whitney, 121 N. W. 1043; 143 Ia. 506.

It is held in Kentucky that where the purpose of the suit is to obtain a perpetual injunction, and the defendant secures a dissolution on motion of the temporary injunction, counsel fees touching the matter of motion for dissolution are not recoverable. Bemis vs. Spalding, 9 Ky. L. Rep. 764; Barber vs. Edelin, 9 Ky. L. Rep. 971.

¹⁵⁸ Curtiss vs. Bachman, 110 Cal. 433; 42 Pac. 910; Cunningham vs. Finch, 88 N. W. (Neb.) 168.

In Wallace vs. York, 45 Iowa 81, the defendant's counsel in the in-

junction proceeding prepared and filed a motion to dissolve, and the necessary affidavits to sustain it, but did not press the matter of dissolution, and the injunction was dissolved at the final hearing, and the services of counsel in the matter of the motion to dissolve were considered to be a proper element of damages.

¹⁵⁹ Ford vs. Loomis, 62 Iowa 586; 16 N. W. 193; 17 N. W. 910.

But see London & Brazilian Bank vs. Walker, 74 Hun 395; 26 N. Y. S. 844.

¹⁶⁰ Neiser vs. Thomas, 46 Mo. App. 47; Citizens Trust & Guaranty Co. vs. Ohio Valley Tie Co., 128 S. W. 317; 138 Ky. 421.

^{160a} Nixon vs. Biloxi, 76 Miss. 810; 25 So. 664; Vicksburg Waterworks vs. Mayor of Vicksburg, 54 So. 852; 99 Miss. 132.

¹⁶¹ Donahue vs. Johnson, 9 Wash. 187; 37 Pac. 322; Whiteside vs.

Services rendered by counsel in resisting the allowance of an injunction are not recoverable as damages, as such charges are incurred before the injunction is issued, and so are not the result of it.¹⁶²

Where the injunction has been dissolved on motion and the case dismissed and the plaintiff appealed, it was held that fees for services in the Appellate Court in a successful endeavor to sustain the judgment of the lower court were properly allowable in an action on the bond.^{162a}

§198. Attachment bonds.

The statutory remedy of attachment gives rise to three classes of bonds.

(1) Bonds to procure an attachment wherein the plaintiff obligates himself with sureties to pay to the defendant such damages as he suffers in consequence of the attachment if it is finally determined that the writ is wrongful and should not have been allowed.

(2) Bonds to release the property seized and restore it to the defendant, wherein the defendant obligates himself with

Noyac Cottage Assoc., 84 Hun 555; 32 N. Y. S. 724; *Anderson vs. Anderson*, 55 Mo. App. 268; *State vs. Nash*, 79 S. E. 829; *Callins vs. Huffman*, 93 P. 220; 48 Wash. 184; *Burnett vs. Stark*, 136 N. W. 670; 155 N. W. 588.

¹⁶² *Randall vs. Carpenter*, 88 N. Y. 293; *Curtiss vs. Bachman*, 110 Cal. 433; 42 Pac. 910.

See also *Youngs vs. McDonald*, 67 N. Y. S. 375. A distinction is made where, in addition to a prayer for a temporary restraining order, there is a request for an order on the defendant to show cause why an injunction should not be made permanent. It has been held that the bond given for the temporary injunction is liable for attorney's fees for services not only in procuring

a dissolution of the temporary injunction, but also in resisting the issuing of a permanent injunction. "The two injunctions must be regarded, not as independent of each other, but as connected parts of one plan for securing relief; virtually, a continuance of the preliminary injunction was sought, and the defendants are entitled to their expenses in successfully opposing it." *Sargent vs. St. Mary's Orphan Boys' Asylum*, 190 N. Y. 394; 83 N. E. 38; *Perlman vs. Bernstein*, 93 App. Div. 335.

^{162a} *Miller vs. Donovan*, 13 Idaho 735; 92 Pac. 991.

Contra—*C. H. Albers Commission Co. vs. Spencer*, 139 S. W. 321; 236 Mo. 608; *Ellwood Mfg. Co. vs. Rankin*, 70 Iowa 403; 30 N. W. 677.

sureties either to pay the plaintiff's claim, if he finally obtain judgment, or return the property taken in attachment to be applied by the plaintiff on his judgment. This bond does not affect the attachment, which still subsists, but relates wholly to the possession and custody of the property pending a final hearing.¹⁶³

(3) Bonds to discharge the attachment wherein the defendant agrees to pay such judgment as the plaintiff may finally recover in the action, which bond is substituted for the property and is a final disposition of the attachment.

There is considerable uniformity in this country in the statutory provisions authorizing attachment bonds. For the most part they have the same general effect and give rise to similar obligations upon the sureties.

The most common condition in bonds to procure attachments is that the plaintiff will pay the defendant all damages which he may sustain by reason of the attachment if the order is wrongfully obtained.

In Alabama the condition is that the obligor will respond to "such damages as he may sustain from the wrongful or *vexatious* suing out of the attachment."

In Indiana "all damages which may be sustained by the defendant, if the proceedings of the plaintiff shall be wrongful and *oppressive*."

In Maryland "all damages which shall be *recovered* against the plaintiff for wrongfully suing out such attachment."

These slight differences in phraseology have given rise to some discussion as to whether the "vexatious" and "oppressive" character of an attachment involves a liability on the bond, in certain cases, for the common law action for malicious prosecution, and limits the recovery to those cases in which malice is shown.¹⁶⁴ And also whether under the limitations of certain

¹⁶³ The form of forthcoming bond provided for in many States, and which best preserves the rights of both parties to the action, is that the property or its *appraised value in money* shall be forthcoming to

answer the judgment of the court in the action.

¹⁶⁴ *Wilson vs. Outlaw*, Minor's Rep. 367. "It was obvious that the taking and detention of his property might be ruinous to the owner,

statutes, the defendant in attachment may have an action on the bond without first recovering or being "awarded" damages against the plaintiff.¹⁶⁵

The main purpose of the courts, however, in the interpretation of the provisions being to construe the undertaking with as much strictness as the rights of the parties will permit, and not to depart from the literal meaning of the terms where it can be avoided. The preponderance of authority is that malice need not be shown as a basis of recovery, and that the damages need not be first adjudicated against the principal.

§199. Attachment bonds not forfeited for irregularities of execution or defects in form.

The statute prescribes the conditions and requirements for bonds in attachment proceedings, but these terms are for the protection of the defendant and the plaintiff and his sureties who have had the benefit of the extraordinary remedy of a seizure of

although there was no sort of malice or corrupt motive in the party at whose suit it might be attached. Why should the condition prescribed for the bond be 'to pay all damages sustained by the *wrongful* or *vexatious* suing out' if it had been the intention of the Legislature that no damages should be recovered unless for malicious suing out? If such had been their intention, would not the term *malicious* readily have occurred, and been used instead of those employed? A verbal criticism can hardly be necessary to prove that the party whose property is attached may find the proceeding wrongful and vexatious, that the suing it out may be ruinous to his credit and circumstances, although obtained without the least malice toward him. . . . If the plaintiff, under colour of such process, do, or procure to be done, what the law

has not authorized, and the defendant is thereby injured, it seems clear, that he is in such case, as much as in any other, entitled to redress from the party whose illegal or 'wrongful' act has occasioned the injury, although it may have been done without malice."

¹⁶⁵ In Tennessee, where the statutory condition is to pay "all damages which shall be recovered against the plaintiff in any suit which may be brought against him, for wrongfully suing out the attachment," it was held that a distinct action need not first be brought against the principal. *Smith vs. Eakin*, 2 Sneed (Tenn.) 456.

But the opposite view was taken in Georgia, Maryland and Mississippi under a similar statute. *Sledge vs. Lee*, 19 Ga. 411; *McLuckie vs. Williams*, 68 Md. 262; 12 Atl. 1; *Holcomb vs. Foxworth*, 34 Miss. 265.

the defendant's property in advance of a judicial determination that the defendant is indebted to the plaintiff, are estopped from claiming immunity from the consequences on account of the defects in their own proceedings.

While the statute limits the right to have attachment to cases in which a bond is executed before the writ issues, yet if the bond is not given until after the attachment is levied, it will be binding on the sureties.¹⁶⁶

And where the form prescribed by the statute is not followed, the bond is nevertheless binding.¹⁶⁷

So a mistake in the recitals of the bond, as where the wrong court is named in which the action is pending,¹⁶⁸ or where the penalty is in excess of the requirement of the statute,¹⁶⁹ or where the bond does not contain the requisite number of sureties¹⁷⁰ or the sureties have not the statutory property qualifications.¹⁷¹

But where the court acquires no jurisdiction of the proceeding in attachment by reason of defects in the affidavit upon which it was issued, the sureties are not estopped from setting up such defense.¹⁷²

§200. Whether damages for malicious prosecution are recoverable upon bond to procure attachment.

While it is conceded generally that recovery can be had upon a bond to procure attachment without alleging and proving malice, it is somewhat mooted whether the common law remedy of trespass on the case for malicious abuse of the process of the court can be prosecuted against the sureties upon the bond, or

¹⁶⁶ *Sumpter vs. Wilson*, 1 Ind. 144.

¹⁶⁷ *Sheppard vs. Collins*, 12 Iowa 570; *Wright vs. Keyes*, 103 Pa. 567; *Robertson & Govanee Contracting Co. vs. Aetna Accident & L. Co.*, 91 Conn. 129, 99 Atl. 557.

¹⁶⁸ *Ripley vs. Gear*, 58 Iowa 460; 12 N. W. 480.

¹⁶⁹ *Hibbs vs. Blair*, 14 Pa. 413.

¹⁷⁰ *Ward vs. Whitney*, 8 N. Y. 442.

¹⁷¹ *Gibbs vs. Johnson*, 63 Mich. 671; 30 N. W. 343.

¹⁷² *Murphy vs. Montandon*, 3 Idaho 325; 29 Pac. 851.

See also *Zechman vs. Haak*, 85 Wis. 656; 56 N. W. 158; *Cadwell vs. Colgate*, 7 Barb. 253.

whether the defendant is limited to his costs and expenses in dissolving the attachment, the injury to his property, and the loss incident to its detention.

It was held in Tennessee and in several other States that a recovery could be had on the bond both for the statutory penalty and the common law penalty for malicious prosecution.¹⁷³ It is held, however, that the malice of an agent in suing out an attachment will not render the principal liable on the bond for exemplary damages.¹⁷⁴

The Kentucky Court of Appeals in an elaborate and forcible argument maintains the view that to impose a liability on the bond sufficient to embrace every injury, both direct and indirect, that the defendant might sustain, would render the remedy by attachment impracticable, and defeat in a great measure the object of the statute, because of the difficulty in executing the necessary bond.¹⁷⁵

¹⁷³ *Smith vs. Eakin*, 2 Sneed (Tenn.) 456; *Renkert vs. Elliott*, 79 Tenu. 235. The same rule is applied in Texas. *Wallace vs. Finberg*, 46 Tex. 25; *Mayer vs. Duke*, 72 Tex. 445; 10 S. W. 565; *Moore vs. Wittenberg*, 13 La. Ann. 22.

See also *Seattle Crockery Co. vs. Haley*, 6 Wash. 302; 33 Pac. 650; *Baldwin vs. Walker*, 94 Ala. 514; 10 South. 391.

¹⁷⁴ *Tynburg vs. Cohen*, 67 Tex. 220; 2 S. W. 734; *Baldwin vs. Walker*, 94 Ala. 514; 10 South. 391; *Seattle Crockery Co. vs. Haley*, 6 Wash. 302; 33 Pac. 650.

¹⁷⁵ *Pettit vs. Mercer*, 8 B. Mon. (Ky.) 51. "The extent to which the plaintiff has a right to recover in a suit of this kind, or in other words, his right to damages commensurate to the injuries sustained by him in consequence of the extraordinary proceeding by attachment, forms the chief subject of inquiry in this case. Has he a right

to show that his credit has been seriously affected, his sensibilities wounded, and his business operations materially deranged, in consequence of the attachment having been sued out; and to rely upon these matters to enhance the amount of damages? Or is he to be confined to the costs and expenses incurred by him, and such damages as he may have sustained by a deprivation of the use of his property, or any injury thereto, or loss or destruction thereof, by the act of the plaintiff in suing out the attachment? . . . If an order has been obtained without just cause, and an attachment has been issued, and acted on in pursuance of the order, the terms of the bond secure to the defendant in the attachment all costs and damages that he has sustained in consequence thereof. The condition of the bond is satisfied, and its terms substantially complied with by securing to him damages adequate to

§201. Forthcoming or redelivery bonds.

A forthcoming bond is either executed directly to the plaintiff in the action, or to the officer holding the writ for the benefit of the plaintiff, and provides for the return of the property in case judgment is awarded the plaintiff, or in default of a return of the property, to pay the plaintiff's judgment, or in some jurisdictions to pay the appraised value of the property to apply on the plaintiff's judgment.¹⁷⁶

Such bond does not affect the attachment itself,^{176a} and proceedings may thereafter be maintained to dissolve the attachment, and action for wrongful attachment instituted the same as if the forthcoming bond had not been given. The execution of the agreement to return the property in case the plaintiff recovers a judgment, is not an admission that the attachment was rightfully obtained, and is only binding upon the obligors in case the attachment is still subsisting at the time the judgment is entered.¹⁷⁷

Although the bond for release of the attached property is not in the form required by statute, it will be binding on the surety if the property is in fact released, such as where the only condition of the bond is to pay whatever judgment is obtained against the plaintiff, whereas the statute provides for a redelivery bond in the usual form.¹⁷⁸

the injury to the property attached, and the loss arising from the deprivation of its use, together with the actual costs and expenses incurred. It cannot be rationally presumed that the Legislature designed to impose on the security in the bond a more extensive liability. The statute is remedial in its character, and should be expounded so as to advance the object contemplated. To impose an almost unlimited liability on the security in the bond, sufficient to embrace every possible injury that the defendant might sustain, would be in effect, to defeat in a great measure, the object of the statute, by rendering it difficult, if not impracticable, for the plaintiff to execute the necessary bond." *Blakeley's Trustee vs. Bogard*, 143 Ky. 377; 136 S. W. 616.

See also *McClendon vs. Wells*, 20 S. C. 514; *Commonwealth vs. Magnolia Villa Land Co.*, 163 Pa. 99; 29 Atl. 793; *Elder vs. Kutner*, 97 Cal. 490; 32 Pac. 563; *Plymouth G.*

M. Co. vs. U. S. F. & G. Co., 35 Mont. 23; 88 Pac. 565; *Floyd vs. Anderson*, 128 P. 249; 5 Okl. Cr. 65.

¹⁷⁶ In Ohio, the redelivery Statute provides "The sheriff shall deliver the property attached to the person in whose possession it was found, upon the execution by such person, in the presence of the sheriff, of an undertaking to the plaintiff, with sufficient surety, resident in the county, to the effect that the parties to the same are bound, in double the appraised value of the property, that the property or its appraised value in money, shall be forthcoming to answer the judgment of the court in the action." *R. S. O.*, Sec. 5529.

^{176a} *Schunack vs. Art Metal Novelty Co.*, 84 Conn. 331; 80 Atl. 290.

¹⁷⁷ *Alexander vs. Jacoby*, 23 O. S. 358.

¹⁷⁸ *Schunack vs. Art Metal Novelty Co.*, 84 Conn. 331; 80 Atl. 290; *Wright vs. Keyes*, 103 Pa. 567.

So also, where the statute provides for a release of attached property on the giving of a bond but requires an order of court as a preliminary condition, the failure to secure the order of court will not invalidate the bond.¹⁷⁹

No recovery can be had on a forthcoming bond unless the property is actually delivered to the defendant in accordance with the terms of the bond. Thus where the sheriff immediately seizes the property released under another attachment,¹⁸⁰ or retains the property because of the insufficiency of the sureties.¹⁸¹

Where by mistake the bond was written conditioned for the dissolution of the attachment, although intended as a forthcoming bond and the property released to the defendant, it was held that no recovery could be had on the bond, since the attachment was not in fact dissolved.¹⁸²

A redelivery bond in attachment, conditioned to redeliver to the sheriff all of the property attached or pay the value thereof, is not satisfied by tendering to the sheriff a portion of the property, and offering to pay the value of the remainder, and this, though the remainder has been sold because perishable.^{182a}

A redelivery bond, fixing the value of the property attached, is conclusive on the sureties in an action to recover the penalty, and they cannot show a different value.^{182b}

A judicial sale following the sustaining of the attachment is conclusive on the parties to the redelivery bond as to the value of the property.^{182c}

§202. Bonds to discharge attachment.

A bond to dissolve or discharge an attachment is a final disposition of the attachment proceeding and is a substitution of the security of the bond for the lien acquired on the property. A motion to dissolve the attachment is no longer necessary after the filing of such bond and if such motion is pending, the bond operates to dismiss it, since the attachment being

¹⁷⁹ Sullivan vs. Williams, 43 S. C. 489; 21 S. E. 642.

¹⁸⁰ Schneider vs. Wallingford, 4 Col. App. 150; 34 Pac. 1109.

See also Eddy vs. Moore, 23 Kas. 113.

¹⁸¹ Cortelyou vs. Maben, 40 Neb. 512; 59 N. W. 94.

¹⁸² Edwards vs. Pomeroy, 8 Col. 254; 6 Pac. 829.

^{182a} Jones vs. Short, 101 P. 209; 53 Or. 525.

^{182b} Jones vs. Short, 101 P. 209; 53 Or. 525; Brumby vs. Barnard, 60 Ga. 292.

^{182c} Creswell vs. Woodside, 15 Col. App. 468; 63 Pac. 330; Jones vs. Short, 101 P. 209; 53 Or. 525.

dissolved by the bond, leaves nothing upon which an order of the court can operate.

The obligors on such bond are bound unconditionally to perform the judgment of the court, and they constructively admit the validity of the attachment, and will be bound whether the attachment was valid or not.¹⁸³

Where the attachment is void by reason of a prohibition of law, the bond to dissolve the attachment is also void. If the attachment is illegal because prohibited by law the bond which takes its place must also be invalid. If the attachment is a nullity then the bond purporting to dissolve the attachment is a nullity, as there is no attachment to dissolve.¹⁸⁴

¹⁸³ *Hazelrigg vs. Donaldson*, 59 Ky. 445; *McMillan vs. Dana*, 18 Cal. 339; *Bowers vs. Beck*, 2 Nev. 139; *Ferguson vs. Glidewell*, 48 Ark. 195; 2 S. W. 711; *Smith vs. United States Express Co.*, 135 Ill. 279; 25 N. E. 525; *Schuyler vs. Sylvester*, 28 N. J. L. 487; *Moffitt v. Garrett*, 100 P. 533; 23 Okl. 398.

Contra—*Love vs. Voorhies*, 13 La. Ann. 549; *Bates vs. Kilian*, 17 S. C. 553.

By statute in Ohio a defendant may at any time before judgment move for the discharge of an attachment under which his property has been taken, although he has previously given a bond for its discharge. *William Edwards & Co. vs. Goldstein*, 80 O. S. 303; 88 N. E. 887; *Leavitt vs. Rosenberg*, 83 O. S. 230; 93 N. E. 904.

But see *Shevlin vs. Whelen*, 41 Wis. 88.

The execution of a bond to discharge the attachment releases the sureties upon the original attachment bond from all liability. *Bick vs. Long*, 15 Ind. App. 503; 44 N. E. 555.

¹⁸⁴ *Pacific National Bank v. Mixer*, 124 U. S. 721; 8 S. Ct. 718. This was an action against a National Bank with a seizure by attachment and a subsequent bond to discharge the attachment. Sec. 5242 of the Federal Statute provides that "No attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court."

Waite, C. J.: "We are, therefore,

of opinion that the attachments in all the suits were illegal and void, because issued without any authority of law. But it is insisted that notwithstanding this bonds are valid and may be enforced. It is undoubtedly true that the sureties on a bond of this kind are estopped from setting up, as a defense to an action for a breach of its condition, any irregularities in the form of proceeding to obtain an attachment authorized by law which would warrant its discharge upon a proper application made therefor. As the purpose of the bond is to dissolve an attachment, its due execution implies a waiver both by the defendant and his sureties of all mere irregularities. So, too, it is no defense that the property attached did not belong to the defendant, or that it was exempt, or that the defendant has become bankrupt or is dead. In all such cases, where there was lawful authority for the attachment, the simple question is, whether the condition of the bond has been broken; that is to say, whether there has been a judgment in the action against the defendant for the payment of money which he has neglected for thirty days afterwards to make. In the present case, however, the question is whether the bond creates a liability when the attachment on which it is predicated was actually prohibited by law. In other words, whether an illegal and therefore a void attachment is sufficient to lay the foundation for a valid bond to secure its formal dissolution. The bond is a substitute for the attachment, although not affect-

Where there was a substitution of a new party defendant after the execution of a bond to dissolve the attachment, it was held that the surety was not liable for the judgment rendered against the new defendant.¹⁸⁵

Also where new parties were added as co-defendants it was considered that the nature of the obligation had been changed and the sureties released.¹⁸⁶

§203. When action accrues upon bonds in attachment.

A judicial determination that the order of attachment was wrongfully issued, constitutes a breach of the condition of the bond to procure an attachment.

A judicial determination that the attachment was rightfully issued coupled with a judgment against the defendant, is a breach of the condition of a bond to release property from the attachment, and where a bond is given to dissolve an attachment, a final judgment against the defendant is a breach of the bond.

The question as to what amounts to a determination of the matters necessary to constitute a breach of a bond given in attachment proceedings has become somewhat complicated by the slight variations in the statutes which authorize the giving of the bonds.

It has been strongly contended that the term "wrongful" used in the statute, relates only to cases in which it is shown that the party resorted to the remedy by attachment without sufficient ground, and that no action accrues on the bond where the attachment is dismissed for want of prosecution, or for omissions and informalities in the proceedings not affecting the

ed by all the contingencies which might have discharged the attachment itself. *Carpenter vs. Turrell*, 100 Mass. 450, 452; *Tapley vs. Goodsell*, 122 Mass. 176, 182. Such being the case, it necessarily follows that if there was no authority in law for the attachment, there could be none for taking the bond.

If the attachment itself is illegal and therefore void, so also must be the bond which takes its place."

See also *Planters Loan & Savings Bank vs. Berry*, 91 Ga. 264; 18 S. E. 137.

¹⁸⁵ *Richards vs. Storer*, 114 Mass. 101.

¹⁸⁶ *Furness vs. Read*, 63 Md. 1.

merits, or where there is merely a judgment against the plaintiff on the claim, without any adjudication of the grounds of attachment.¹⁸⁷

The rule has been distinctly asserted that a wrongful attachment can not be inferred from a voluntary dismissal of the action,¹⁸⁸ and that the mere fact that the attachment has been dissolved does not establish a liability against the bond without a specific determination that the writ was wrongful.¹⁸⁹

The better reasoning seems to support the contrary view, which by analogy to the right of action upon injunction bonds,¹⁹⁰ is that a voluntary abandonment of an attachment proceeding must be deemed an admission that it is wrongful, for otherwise, even if wrongful in fact, the defendant would be without remedy as he is deprived of an opportunity to secure an adjudication dissolving the attachment.¹⁹¹

The failure of the attaching plaintiff to sustain his action, is at least *prima facie* evidence that the attachment is wrongful, even without any adjudication on the merits of the attachment.

¹⁸⁷ *Sharpe vs. Hunter*, 16 Ala. 765. In this case the attachment was dismissed for informalities in the affidavit, and in an action upon the bond it was held that the dismissal of the attachment is not a judicial determination that the attachment was wrongful. The Court said, "What is meant by the term 'wrongful,' as used in the statute to which this bond conforms? Was it, as is contended, designed to apply to defects in the form of the proceeding, on account of which the attachment should be quashed, as well as to the ground upon which it was to be issued? Or was the object of the framers of the act merely to provide a remedy against persons who should resort to this extraordinary remedy to the prejudice of another without cause or sufficient ground therefor? We think that, by the wrongful suing out of

the attachment, is meant, not the omissions, irregularities or informalities which the officer issuing the process may have committed in its issuance, but that the party resorted to it without sufficient ground.*

See also *Calhoun vs. Hannan*, 87 Ala. 277; 6 South. 291; *Petty vs. Lang*, 81 Tex. 238; 16 S. W. 999; *Blanchard vs. Brown*, 42 Mich. 46; 3 N. W. 246; *Boatwright vs. Stewart*, 37 Ark. 614.

¹⁸⁸ *Nockles vs. Eggspieler*, 47 Iowa 400; *Rachelman vs. Skinner*, 46 Minn. 196; 48 N. W. 776; *Pettit vs. Mercer*, 8 B. Mon. (Ky.) 51.

¹⁸⁹ *Storz vs. Finklestein*, 48 Neb. 27; 66 N. W. 1020.

¹⁹⁰ *Ante* Sec. 193.

¹⁹¹ *Steinhardt vs. Leman*, 41 La. Ann. 835; 6 South. 665; *Hollingsworth vs. Atkins*, 46 La. Ann. 515; 15 South. 77; *Jerman vs. Stewart*, 12 Fed. Rep. 266.

There are also good grounds for holding that the sureties are concluded by such judgment against the plaintiff, for an attachment can not be otherwise than wrongful, if the plaintiff has no claim.¹⁹²

A dismissal of an attachment by reason of a failure of an officer to perform his duty raises no presumption of wrongful suing out.¹⁹³

An attachment issued upon a defective affidavit is equally burdensome upon the defendant, as if the affidavit had been formal. A party has a right to require that the forms of law be strictly observed in all proceedings to which he is a party. An attachment upon a defective affidavit is wrongful in more than a technical sense, since the defendant should not be required to waive the formal defects in order to get a hearing upon the merits of the attachment.

The rule that a dissolution of the attachment for cause other than on its merits is not a breach of the bond comes to this. If the defendant waives the irregularities and invokes a judicial determination of the ground of attachment, and thereby secures a dismissal, he may recover his damages on the bond, but if by requiring an observance of the forms of law in the matter of procedure, the attachment on his motion is dismissed, he waives his damages, since he thereby fails to get a dissolution on the merits of the case, which is deemed essential to an action on the bond.¹⁹⁴

It is held that a bond in attachment conditioned that the plaintiff shall prosecute his suit with effect is liable where the writ has been quashed for non-compliance with the statute, although a new attachment was immediately taken out and the action prosecuted with effect.^{194a}

No action upon a forthcoming bond accrues until a final disposition of the case, even though the attachment has in the meantime been sustained.¹⁹⁵ But action can be prosecuted upon the bond to procure an attachment whenever it is finally determined that the writ is wrongful. This may occur before final judg-

¹⁹² Harger vs. Spofford, 46 Iowa 11.

¹⁹³ Offtenderinger vs. Ford, 92 Va. 636; 24 S. E. 246.

¹⁹⁴ Lobenstein vs. Hymson, 90 Tenn. 606; 18 S. W. 250. In this case the attachment was dismissed for defective affidavit and the action brought on the bond to recover dam-

ages for wrongful attachment, and it was held that the defense could not be interposed that good grounds for the attachment existed.

^{194a} Twidwell vs. Smith, 158 Ill. App. 142.

¹⁹⁵ Hansford vs. Perrin, 6 B. Mon. (Ky.) 505; Farris vs. Matthews, 149 Ky. 455; 149 S. W. 896.

ment on the claim, and such right arises, even though the judgment on the claim is in favor of the plaintiff.¹⁹⁰

Where the bond is conditioned that the plaintiff shall respond in damages, if he "shall fail to prosecute his action with effect," an action on the bond after dissolution, but before final judgment, is premature.¹⁹⁷ It has been held that a judgment in favor of the principal without any adjudication upon the attachment, operates constructively as a dissolution of the attachment, and constitutes a breach of the bond.¹⁹⁸ Such holding is exceptional, and the general rule is that a final judgment in favor of the principal is an affirmance of an attachment.¹⁹⁹

The sureties upon a bond to discharge an attachment are concluded by the judgment against the principal.²⁰⁰

§204. Good faith of the plaintiff, or probable cause for attachment not a defense in actions upon bonds.

Though the plaintiff acts in good faith and without malice, he must nevertheless respond in damages upon his bond if the attachment is wrongful,²⁰¹ neither is it any justification of a wrongful attachment that the plaintiff had good reason to believe that grounds of attachment existed as set out in his affidavit.²⁰²

In Iowa the code exempts the plaintiff from liability where

¹⁹⁶ *Tynberg vs. Cohen*, 76 Tex. 409; 13 S. W. 315; *Offterdinger vs. Ford*, 92 Va. 636; 24 S. E. 246; *Kerr vs. Reece*, 27 Kan. 469.

¹⁹⁷ *Gunnis vs. Cluff*, 111 Pa. 512; 4 Atl. 920; *Harbert vs. Gormley*, 115 Pa. 237; 8 Atl. 415.

¹⁹⁸ *Sannes vs. Ross* 105 Ind. 558; 5 N. E. 699.

¹⁹⁹ *New Haven Lumber Co. vs. Raymond*, 76 Iowa 225; 40 N. W. 820.

²⁰⁰ *Jayne's Exrx. vs. Platt*, 47 O. S. 262; 24 N. E. 262. The same rule applies to the sureties upon a forthcoming bond if judgment is entered sustaining the attachment, it can

not be shown in an action upon the bond that the property was exempt from execution, as this question is determined by the judgment. *Lane Implement Co. vs. Lowder*, 65 Pac. Rep. (Okl.) 926.

²⁰¹ *McDaniel vs. Gardner*, 34 La. Ann. 341; *Elder vs. Kutner*, 97 Cal. 490; 32 Pac. 563; *Churchill vs. Abraham*, 22 Ill. 456.

²⁰² *Alexander vs. Hutchinson*, 9 Ala. 825; *Metcalf vs. Young*, 43 Ala. 643; *Pollock vs. Gantt*, 69 Ala. 373; *Carothers vs. McIlhenny*, 63 Tex. 138.

Sec. 3887, Iowa Code.

he has reasonable cause for belief that the grounds for attachment existed.²⁰³

§ 205. Sureties estopped from questioning the regularity of the proceedings out of which their liability arises.

It is not competent for the sureties when sued upon the bond to question any of the proceedings wherein the facts were judicially determined upon which their liability rests; even though not parties to the proceeding in which the attachment was dissolved they are nevertheless bound by it.

Whether the allegations of the affidavit are true upon which the attachment rests, cannot be inquired into in the suit upon the bond.²⁰⁴ All matters of form or substance necessary for the court to have adjudicated in pronouncing its judgment as to the validity of the attachment are conclusive upon sureties.²⁰⁵

The sureties will not be permitted to show by way of defense that the property taken is not subject to attachment, if by their undertaking they have agreed to restore it to the defendant, such covenant must be fulfilled whether the defendant can maintain his claim upon the property or not.²⁰⁶

It is no defense upon a forthcoming bond that the officer levying the writ had no authority to do so,²⁰⁷ or that the property did not belong to the defendant.²⁰⁸

²⁰³ Nordhaus vs. Peterson, 54 Iowa 68; 6 N. W. 77; Charles City Plow Co. vs. Jones, 71 Iowa 234; 32 N. W. 280.

²⁰⁴ Bennett vs. Southern Bank, 61 Mo. App. 297; Vurpillat vs. Zehner, 2 Ind. App. 397; 28 N. W. 556.

²⁰⁵ Fusz vs. Trager, 39 La. Ann. 292; 1 South. 525; Jaynes vs. Platt, 47 O. St. 262; 24 N. E. 262; Goebel vs. Stevenson, 35 Mich. 172; Guthrie vs. Fisher, 2 Idaho 101; 6 Pac. 111; Hoge vs. Norton, 22 Kan. 374; Jerman vs. Stewart, 12 Fed. Rep. 266; Huff vs. Hutchinson, 14 Howard 586.

An amendment of the complaint, not setting up a new cause of action, but merely increasing the amounts demanded for breach of contract, does not discharge a surety company executing a bond to release an attachment where the obli-

gation of the bond is to pay any judgment obtained in the action. Unless the amendments are such as to substitute new or different parties, or to state a new and independent cause of action, the sureties in the attachment bond are bound by the judgment against the principal. Turner vs. Fidelity & Deposit Co. of Maryland, (Cal.) 200 Pac. 959, (1921).

Contra—Sloan vs. Langert, 6 Wash. 26; 32 Pac. 1015.

But see Seattle Crockery Co. vs. Haley, 6 Wash. 302; 33 Pac. 650.

²⁰⁶ McMillan vs. Dana, 18 Cal. 339; Pierce vs. Whiting, 63 Cal. 538; Hobson vs. Hall, 14 S. W. (Ky.) 958.

²⁰⁷ Abbott vs. Williams, 15 Colo. 512; 25 Pac. 450.

²⁰⁸ Klippel vs. Oppenstein, 8 Colo. App. 187; 45 Pac. 224.

§206. Exoneration of sureties in attachment proceedings.

The defendant in attachment who executes a forthcoming bond is exonerated from liability by delivering up, or offering to deliver, the property seized under the writ, but it is not a sufficient compliance with this duty to merely tell the plaintiff or the officer where the property is.²⁰⁹

The bond cannot be exonerated *pro tanto* by a delivery of a part of the attached property.²¹⁰

It is held that if the identical property is delivered, the bond is satisfied, even though the property has been damaged while in the custody of the obligor.²¹¹

If a subsequent bond to discharge the attachment is executed, the forthcoming bond is exonerated.²¹²

Where there is an amendment to the attachment process, such as a discontinuance as to one party and a substitution of a new party, a prior bond to discharge the attachment is exonerated.²¹³ But such rule is not applied where a new party is added by amendment, without a discontinuance of the process against the parties originally served.²¹⁴

Amendments to the petition or declaration which do not change the cause of action do not exonerate the prior bonds.²¹⁵

An alteration of the date when the writ was returnable, with

²⁰⁹ Chapline vs. Robertson, 44 Ark. 202.

²¹⁰ Bland vs. Creager, 13 B. Mon. (Ky.) 509; Metrovich vs. Jovovich, 58 Cal. 341.

²¹¹ Jones vs. Jones, 38 Mo. 429. But see Schnyler vs. Sylvester, 28 N. J. L. 487; Bell vs. Western River Imp. Co., 60 Ky. 558.

²¹² Dearborn vs. Richardson, 108 Mass. 565.

²¹³ Tucker vs. White, 5 Allen 322; Richards vs. Storer, 114 Mass. 101; Adams vs. Jacoway, 34 Ark. 542.

²¹⁴ Christal vs. Kelly, 88 N. Y. 285.

²¹⁵ Jayne's Ex. vs. Platt, 47 O. S. 262; 24 N. E. 262; Kellogg vs. Kimball, 142 Mass. 124; 7 N. E. 728.

See also Townsend Nat. Bank vs. Jones, 151 Mass. 454; 24 N. E. 593. Where the amendment was as to the amount claimed, and it was held that while the bond was not liable for the increased damages claimed by the plaintiff, it was not thereby exonerated as to the original amount claimed.

the consent of the parties, but without the consent of the sureties, was deemed an exoneration of the bond as to the sureties.²¹⁶

No recovery can be had upon a discharge bond if the judgment against the defendant is void. Thus where no summons was served upon the defendant, the judgment being void for want of service, no liability attaches to the sureties upon the bond.²¹⁷

It is held that a reference of the case to arbitrators and a finding against the defendant is not such a variance from the conditions of the discharge bond as will release the sureties.²¹⁸

A judgment against one of several defendants and in favor of the others constitutes a breach of a bond to discharge an attachment, and the sureties cannot claim exoneration even though the condition of the bond is to pay any judgment that may be rendered against the "defendants."²¹⁹

§207. Attachment bonds are available in any court to which the case is taken on appeal.

An attachment bond is available in any court to which the case goes by appeal or error proceedings, even though the conditions of the bond do not so provide.²²⁰

But where judgment was against the plaintiff, and the attachment dissolved, and the plaintiff appealed from the judgment, it was held that the adjudication dissolving the attachment was final, and unless specially appealed from, released the sureties notwithstanding the plaintiff obtained judgment upon his claim in the Appellate Court.²²¹

Where the defendant appeals, and judgment is against him in the Appellate Court, the plaintiff may elect whether he will proceed against the sureties upon the attachment bond or the appeal bond.²²²

²¹⁶ Simeon vs. Cramm, 121 Mass. 492.

²¹⁷ Clark vs. Bryan, 16 Md. 171.
See also Jewett vs. Crane, 35 Barb. 208.

²¹⁸ Seavey vs. Beckler, 132 Mass. 203.

²¹⁹ Gilmore vs. Crowell, 67 Barb. 62.

²²⁰ Ball vs. Gardiner, 21 Wend. 270; Bennett vs. Brown, 20 N. Y. 99; State vs. McGlothlin, 61 Iowa 312; 16 N. W. 137.

²²¹ Barton vs. Thompson, 66 Iowa 526; 24 N. W. 25.

²²² Chrisman vs. Rogers, 30 Ark. 351.

§208. Measure of damages in actions upon attachment bonds.

The actual loss of the defendant in consequence of a wrongful attachment may be recovered on the bond. This may include the depreciation in the value of the property while in the hands of the officer,²²³ and the loss of the use of the property.²²⁴

The expenses of the defendant in securing a dissolution of the attachment, such as the value of his own time,²²⁵ or traveling expenses and hotel bills incurred in attending the hearing upon the attachment,²²⁶ are recoverable on the bond.

It is held that recovery can be had as compensation for the annoyance and mortification to defendant by a wrongful and vexatious attachment.²²⁷

Only those injuries which are the direct result of the wrongful attachment can be recovered. Speculative damage, however probable, will be excluded.²²⁸ Injury to the credit of the defendant in attachment is generally considered too remote a consequence, and not a proper element of damage.²²⁹

²²³ Frankel vs. Stern, 44 Cal. 168; Hoge vs. Norton, 22 Kan. 374. In this case cattle were seized in attachment and the loss alleged was the failure to secure the natural and expected increase of weight, because of the removal of the cattle by the sheriff to a new range where the feed and water were limited, and this was held to be a proper measure of damages.

²²⁴ Hurd vs. Barnhart, 53 Cal. 97; Boatwright vs. Stewart, 37 Ark. 614; State vs. McKeon, 25 Mo. App. 667.

²²⁵ Higgins vs. Mansfield, 62 Ala. 267; Sanford vs. Willetts, 29 Kan. 647.

Contra—Smith vs. American Bonding Co., 76 S. E. 481; 160 N. C. 574.

²²⁶ Damron vs. Sweetser, 16 Ill. App. 339; State vs. Shobe, 23 Mo. App. 474.

Contra—Smith vs. American Bonding Co. 76 S. E. 481; 160 N. C. 574.

²²⁷ Floyd vs. Hamilton, 33 Ala.

235; Byrne vs. Gardner, 33 La. Ann. 6.

²²⁸ Higgins vs. Mansfield, 62 Ala. 267. In this case recovery was sought for loss resulting from a demoralization of plaintiff's workmen during his absence attending the attachment suit.

²²⁹ Holliday vs. Cohen, 34 Ark. 707; Goodbar vs. Lindsley, 51 Ark. 380; 8 S. W. 132. In this case the defendant suffered great damages in consequence of numerous executions, which were precipitated by the wrongful attachment, but the injury was considered too remote for recovery on the bond. Oberne vs. Gaylord, 13 Ill. App. 30; Campbell vs. Chamberlain, 10 Iowa 337; Pettit vs. Mercer, 8 B. Mon. (Ky.) 51; Seattle Crockery Co. vs. Haley, 6 Wash. 302; 33 Pac. 650; Sterling vs. Marine Bank, 120 Md. 396; 87 Atl. 697.

But see State vs. Andrews, 39 W. Va. 35; 19 S. E. 385; Meyer vs. Fagan, 34 Neb. 184; 51 N. W. 753; Northampton Nat. Bank vs. Wylie,

Where moneys due the defendant are tied up by garnishment, recovery may be had for interest on the fund while it is detained.²³⁰

Where the property attached did not belong to the defendant, it was held that he was not entitled to recover his expenses incurred in the discharge of the attachment.²³¹

Where the property is already incumbered with liens equal to its value, the sureties upon the forthcoming bond will only be liable for nominal damages for failure to deliver.²³²

Reasonable attorney fees paid in resisting the attachment may be recovered as damages.²³³ Such fees must, however, be actually paid or contracted for before they become a subject of damages.²³⁴ It is held that the giving of notes for counsel fees is sufficient payment to justify a recovery.²³⁵ Counsel fees incurred in the trial of the case on its merits are not recoverable on the bond, even though the result of the trial is a dissolution of the attachment.²³⁶

Counsel fees expended in defending a wrongful attachment are not recoverable where no property was actually attached.^{236a}

52 Hun 146; 4 N. Y. S. 907; Marx vs. Leinkauff, 93 Ala. 453; 9 South. 818.

²³⁰ Fourth Nat. Bank vs. Mayer, 96 Ga. 728; 24 S. E. 453; Green Fruit Co. vs. Pate, 99 Ga. 60; 24 S. E. 455; Strong vs. Hasterlik, 146 Ill. App. 346.

²³¹ Tebo vs. Betancourt, 73 Miss. 868; 19 South. 833.

²³² Hayman vs. Hallam, 79 Ky. 389.

²³³ Trapnall vs. McAfee, 60 Ky. 34; Marchand vs. York, 10 Ky. L. Rep. 777; Northrup vs. Garrett, 17 Hun 497; Damron vs. Sweetser, 16 Ill. App. 339; State vs. McKeon, 25 Mo. App. 667; Adam vs. Gomila, 37 La. Ann. 479; Byrne vs. Gardner, 33 La. Ann. 6; Green Fruit Co. vs. Pate, 99 Ga. 60; 24 S. E. 455; Swift vs. Plessner, 39 Mich. 178; Bash vs. Howald, 27 Okl. 462; 112 Pac. 1125.

But counsel fees expended for prosecuting an action on the bond for damages for the issuing of a wrongful attachment are not recoverable. Chisenhall vs. Hines, 100 S. W. 362.

Contra—By statute in Iowa. Peters vs. Suavely-Ashton, 122 N. W. 836; 144 Ia. 147.

Contra—Heath vs. Lent, 1 Cal.

410; Commonwealth vs. Meyer, 170 Pa. 380; 32 Atl. 1044; Littleton vs. Frank, 70 Tenn. 300; Plumb vs. Woodmansee, 34 Iowa 116.

Attorney fees are not allowed as damages upon attachment bonds in the Federal Courts, where not controlled by state practice. Bucki & Son Lumber Co. vs. Fidelity & Deposit Co., 109 Fed. Rep. 393. Dissenting opinion, *Shelby, J.* The holding of the majority of the Court allowing attorney fees was based upon a construction of the Florida Statute.

²³⁴ Schultz vs. Morrison, 60 Ky. 98; Raymond vs. Greene, 12 Neb. 215; 10 N. W. 709.

Contra—Plymouth Gold Mining Co. vs. U. S. F. & G. Co., 35 Mont. 23; 88 Pac. 565; Marks vs. Mass. Bonding & Ins. Co., 117 N. Y. S. 1019; Bash vs. Howald, 27 Okl. 462; 112 Pac. 125.

²³⁵ State vs. Gage, 52 Mo. App. 464.

²³⁶ State vs. Heckart, 62 Mo. App. 427; Elwell vs. Seattle Scandinavian Fish Co., 2 Alaska 617.

But see Dothard vs. Sheid, 69 Ala. 135; Wilson vs. Root, 43 Ind. 486.

^{236a} State vs. Binney, 127 Mo. App. 710; 106 S. W. 1114.

Where jurisdiction of the defendant is obtained solely by the attachment, as where the property of a non-resident is seized, there would seem to be a special ground for allowing as damages counsel fees paid in defending principal action.²³⁷

§209. Replevin bonds.

An action in replevin is instituted for the purpose of taking forcible possession of personal property under a claim of ownership or right of possession adverse to the one having the custody and control of the property.

The primary motive of the plaintiff in replevin is to recover the property in specie, and this is the most valuable object obtained by the writ. The possession of the property in specie is, however, as valuable a right to the defendant as to the plaintiff. And it is of the highest importance that the party who asserts claims upon personal property in the possession of another, and by forcible invasion, aided by the machinery of the law, seizes and takes it away, should be required to fully indemnify the defendant against the consequences, in case the action of the plaintiff is adjudged wrongful.

Accordingly wherever the action of replevin is in force the giving of a preliminary bond is jurisdictional, and the court has no authority to order the writ, or the officer to serve it, except upon the condition of the execution of a bond.²³⁸

The imperative statutory requirement of a bond cannot be dispensed with even by a deposit of money in lieu of the bond.²³⁹

²³⁷ Buckley vs. Van Diver, 70 Miss. 622; 12 South. 905; Fixal vs. Tallman, 116 N. Y. S. 639; Tyng vs. American Surety Co., 48 App. Div. 240.

Contra—Frost vs. Jordan, 37 Minn. 544; 36 N. W. 713.

²³⁸ Dowell vs. Richardson, 10 Ind. 573; Garlin vs. Strickland, 27 Me. 443; Bent vs. Bent, 43 Vt. 42; Graves vs. Sittig, 5 Wis. 219.

In Tennessee the Code provides

that in case a plaintiff in replevin takes possession of property under a bond, defective either in form or in respect to the solvency of the sureties, that the Court may order the defects to be remedied, and enforce the order by the imprisonment of the plaintiff until the order is complied with. Sec. 5147.

²³⁹ Cummings vs. Gann, 52 Pa. 488.

§210. Conditions of bonds in replevin.

A bond in replevin must contain at least three conditions in order to fully protect the rights of the defendant.

(1) That the plaintiff will prosecute his action with diligence.

(2) That the plaintiff will restore the property of the defendant, or pay its value in money, in case it is determined that the seizure was wrongful.

(3) That the plaintiff will pay the defendant such damages as he suffers by the wrongful seizure and detention.

These are the customary requirements of the statutes, but the bond will not be void even though the conditions imposed by statute are not incorporated in the undertaking.²⁴⁰

The officer serving the writ is usually made the sole judge of the sufficiency of the bond, and may refuse to accept an undertaking which does not in all respects conform to the law, and is liable on his own bond for failure to require a statutory bond in replevin,²⁴¹ and where such discretion is given by statute to the officer the court will not interfere to control the discretion.²⁴²

A bond containing a penalty in a less sum than that required by law is not thereby defective.²⁴³ Where the qualifications of the sureties are not such as the statute requires, the bond, although irregular, is not voidable.²⁴⁴

§211. Bonds in replevin which are void.

While replevin bonds under which the parties have seized the property will be liberally construed to avoid a forfeiture and will not be invalidated for mere nonconformity to the statute, yet if any essential element of a contractual relation is wanting the bond cannot be enforced, such as where the surety has not the capacity to contract.²⁴⁵

²⁴⁰ *Hicklin vs. Nebraska, etc., Bank*, 8 Neb. 463; *Fawcner vs. Baden*, 89 Ind. 587; *Lambden vs. Conway*, 5 Harr. (Del.) 1.

²⁴¹ *Hughes vs. Newsom*, 86 N. C. 424; *Hall vs. Monroe*, 73 Me. 123.

²⁴² *Bulmer vs. Jenkins*, 3 How. Pr. 11.

²⁴³ *Freeman vs. Davis*, 7 Mass. 200;

²⁴⁴ *State vs. Dunn*, 60 Mo. 64.

²⁴⁵ *Coverdale vs. Alexander*, 82 Ind. 503.

Also where the court has no jurisdiction over the subject matter of the suit ²⁴⁶ or the law under which the action is instituted has been repealed ²⁴⁷ the bond is invalid.

§212. What constitutes a breach of a replevin bond.

A failure to prosecute an action in replevin without delay is a breach of the bond, where the delay is unusual and by the fault or procurement of the plaintiff.²⁴⁸

A voluntary dismissal of the action is of course a direct violation of the undertaking and renders the bond liable.²⁴⁹ Even a dismissal by the court for want of jurisdiction to hear the cause, the writ being properly issued, is a breach of the bond.²⁵⁰

Where the action is abated without the fault of the plaintiff, as where the dismissal results by operation of law, by reason of the absence of the court at the time and place appointed for

²⁴⁶ Caffrey vs. Dudgeon, 38 Ind. 512.

Contra—Fahnestock vs. Gilham, 77 Ill. 637; Bierma vs. Columbia Typewriter Mfg. Co., 179 Ind. App. 69.

²⁴⁷ Hicks vs. Mendenhall, 17 Minn. 475. It is held that the question of the unconstitutionality of the law under which the writ was issued cannot be raised in an action on the bond. Magruder vs. Marshall, 1 Blackford 333.

²⁴⁸ Humphrey vs. Taggart, 38 Ill. 228; Elliott vs. Black, 45 Mo. 372; Mills vs. Gleason, 21 Cal. 274; Berghoff vs. Heckwolf, 26 Mo. 511.

²⁴⁹ Wiseman vs. Lynn, 39 Ind. 250; McKey vs. Lauflin, 48 Kan. 581; 30 Pac. 16.

It has been held that where the action is dismissed without prejudice for want of prosecution on motion of the defendant and no judgment for return or for damages is entered, the defendant thereby loses his right of action on the bond. Howard vs. Wyatt, 145 Ky. 424; 140 S. W. 655.

Contra—Seaboard Air Line vs. Hewlett, 94 S. C. 478; 78 S. E. 329.

²⁵⁰ Pierce vs. King, 14 R. I. 611; Biddinger vs. Pratt, 50 O. S. 719; 35 N. E. 795. *Per Curia*: "One of the stipulations of the undertaking was that the plaintiff 'would duly prosecute the action,' and this means prosecute it to effect. This he failed to do. True, the action was dismissed for want of jurisdiction in the justice to try it, and on the motion of the defendant. But the plaintiff cannot be heard to complain of that because he elected to bring his action in that court, and used its process to obtain possession of the property in dispute, which he still retained; neither can his sureties, because, by signing the undertaking they agreed to make good the default of the principal, and whatever liability attaches to him by reason of the obligation, must equally bind them. The defendant is not at fault. He was given the choice either to challenge the jurisdiction, or, by silence, consent to have his rights adjudicated by a court which was without jurisdiction. He should not be prejudiced by this effort to vindicate his rights." Seaboard Air Line vs. Hewlett, 78 S. E. 329; 94 S. C. 478.

trial,²⁵¹ or because of the death of a party,²⁵² the condition as to diligent prosecution is not broken.

If the action is dismissed by the court, even without a finding as to the title of the property because of some defect in the process or a failure of proof, it will constitute a breach of the bond.²⁵³

No action can be maintained on the bond until the case is finally determined,²⁵⁴ and if the case is taken into the Appellate Court the remedy on the bond must await the judgment of that court.²⁵⁵

§213. Sureties upon replevin bonds are concluded by the final order in the replevin action.

A judgment against the plaintiff either dismissing the action or finding the right of property in the defendant is conclusive against the sureties in an action upon the bond.²⁵⁶ The same rule applies where the defendant gives a redelivery bond and is defeated in the action, his sureties are concluded by the judgment.²⁵⁷

²⁵¹ *Pierce vs. Hardee*, 1 *Thomp. & Cook* (N. Y.) 557; *Flannigan vs. Erwin*, 173 *Ill. App.* 452.

²⁵² *Burkle vs. Luce*, 1 *N. Y.* 163.

²⁵³ *Wood vs. Coman*, 56 *Ala.* 283; *Smith vs. Whiting*, 100 *Mass.* 122; *Boom vs. St. Paul, etc.*, 33 *Minn.* 253; 22 *N. W.* 538; *Elliott vs. Black*, 45 *Mo.* 372; *Waddell vs. Bradway*, 84 *Ind.* 537; *Little vs. Bliss*, 55 *Kan.* 94; 39 *Pac.* 1025.

²⁵⁴ *Scott vs. Elliott*, 63 *N. C.* 215; *Wright vs. Marvin*, 59 *Vt.* 437; 9 *Atl.* 601.

²⁵⁵ *Corn Exchange Bank vs. Blye*, 102 *N. Y.* 305; 7 *N. E.* 49; *McMillan vs. Baker*, 20 *Kan.* 50.

²⁵⁶ *Peck vs. Wilson*, 22 *Ill.* 205; *Mason vs. Richards*, 12 *Iowa* 73; *Cantril vs. Babcock*, 11 *Colo.* 143; 17 *Pac.* 296; *Ernst Bros. vs. Hogue*, 86 *Ala.* 502; 5 *South.* 738; *Jacobson vs. Metzgar*, 43 *Mich.* 403; 5 *N. W.* 455; *Bank vs. Martin*, 81 *Kan.* 794; 106 *Pac.* 1056.

The judgment, however, will not be enlarged by implication so as to include a finding which the court might have made but which was not actually entered, thus where the judgment was that the defendant was entitled to the property, but no

order was made requiring the plaintiff to return the property or assessing damages in default of a return. It was held that the sureties were not liable for the value of the property. "Under the letter of this bond, no judgment was ever entered that the property should be returned, and until that was done, there could be no liability on the part of the sureties." *Munding vs. Michael*, 10 *O. C. C.* 165.

²⁵⁷ *Kennedy vs. Brown*, 21 *Kan.* 171. The view that the judgment against the principal is conclusive on the sureties was tersely stated in *Bierce vs. Waterhouse*, 219 *U. S.* 320, wherein the court said: "The issue as to whether the value of the property redelivered to the defendants was greater than alleged in the plaintiff's affidavit and claimed in the original complaint, as well as whether the amendment of that complaint was such as to change the cause of action, were issues made and decided against the principal in the bond upon which the sureties were bound and cannot be relitigated, in the absence of fraud and collusion, by a surety when sued upon the bond."

A judgment entered by confession or by consent of the parties without the knowledge of the sureties is an adjudication which binds the sureties,²⁵⁸ except where such confession of judgment is collusive and fraudulent.

None of the matters necessarily adjudicated in the replevin action will be re-examined in the action on the bond.²⁵⁹ The sureties will not be permitted to show that the property taken in replevin belonged to a stranger and not to either party to the action.²⁶⁰

An action against the sureties on a redelivery bond in replevin may be maintained without the issuance of an execution on the judgment in replevin and without a demand for the return of the property.^{260a}

§214. Measure of damages in action upon replevin bond.

The defendant in replevin is entitled to recover full compensation for his loss if it is finally determined that the writ was wrongful.

The issue in replevin is whether the plaintiff is entitled to keep the property which he has taken from the defendant, or is bound to return it with damages for the detention. If the defendant prevails on this issue the plaintiff is thereby adjudged guilty of a violation of the defendant's rights and the mere restoration of the property, or its equivalent in money, in many cases will fall short in compensating the defendant for the wrong done to him by the interruption of his possession.

If the detention has damaged his business by depriving him of the use of property necessary to the conduct of the business, the defendant may recover compensation for this loss.

Where the damages for detention are assessed in the replevin action the amount of recovery on the bond is thereby fixed and determined.

If no recovery is had in the replevin action, as where the case is dismissed without trial, the damages for unlawful detention must be assessed, if at all, in the action on the bond.²⁶¹

²⁵⁸ *Estey vs. Harmon*, 40 Mich. 645.

²⁵⁹ *Denny vs. Reynolds*, 24 Ind. 248.

²⁶⁰ *Smith vs. Lisher*, 23 Ind. 500; *First State Bank vs. Martin*, 81 Kan. 794; 106 Pac. 1056.

^{260a} *First State Bank vs. Martin*, 81 Kan. 794; 106 Pac. 1056.

²⁶¹ In *Stevens vs. Tuite*, 104 Mass. 328, it was held that the damages for unlawful detention must be assessed in the replevin action and not in the action on the bond. This

In a suit on the bond, the plaintiff is entitled to recover the amount found in the replevin suit to have been the value of the property where and when it was taken, with interest thereon from the date of the finding in the replevin suit. It is not competent for the obligors in the bond to show that the property was of less value than the amount stated in the writ of replevin and the bond; but it is competent for the obligee to show that the value was greater. The finding in the replevin suit as to the value of the property where and when it was taken is competent and conclusive evidence, as against the obligors, of such value.²⁶²

action was, however, fully tried on its merits, and a failure to secure an adjudication of damages, where opportunity was afforded, might well be deemed a waiver.

Ames, J. (334): "But the wrong to the original defendant (and present plaintiff) was more than the mere detention of the property and interruption of its use. It was more injurious to him than if he had been simply locked out of his place of business during the pendency of the suit. His complaint is, that his cloth printing establishment was wrongfully broken up; his steam engine, machinery, fixtures and apparatus taken down and carried away; and that returning the property or its equivalent in money will still leave him subject to the great expense, inconvenience and delay of the entire reconstruction of his works. It is manifest that the damages actually awarded him do not cover all the elements of damage which he was entitled to prove, and might have proved; and that the amount allowed him was for that reason inadequate as an indemnity for the wrong that he had sustained. The difficulty in the present plaintiff's case lies in the fact that all these elements of claim are comprehended under the general head of damages recoverable in the original action. The time to prove his damages, and to have them assessed, in order to be included in the judgment, was when the replevin suit was before the court and on trial. At that stage of the case, and for that purpose, he certainly was an actor or plaintiff claiming compen-

sation for the injury done him by the wrongful act of replevying the goods out of his hands. In contemplation of law, his claim for compensation (independently of the return of the goods, or their equivalent in money, as secured by the bond) would be made up of, 1st, interest on the money value; 2nd, the general inconvenience and loss resulting from the interruption of his possession; and 3rd, the expense, trouble and delay attending the operation of replacing everything and restoring the establishment to its original condition. This is an entire and indivisible claim. He cannot recover part of it in one action, and subsequently maintain another for the remainder."

²⁶² *Washington Ice Co. vs. Webster*, 125 U. S. 426; 8 S. Ct. 947; *Lindsey vs. Hewitt*, 86 N. E. 446; 42 Ind. App. 573. It is held that the measure of damages is the value of the property at the time of the trial and not at the time it was replevied. *Kirkendall vs. Hartsock*, 58 Mo. App. 234; *Gardner vs. Brown*, 22 Nev. 156; 37 Pac. 240; *Gray vs. Robinson*, 33 Pac. Rep. (Ariz.) 712.

But see *Linasey vs. Hewitt*, *supra*, where the value is fixed as of the date of the judgment for its return.

It is also held that the plaintiff in replevin is bound by the valuation put upon the property in the bond.

Cyclone Steam Snowplow Co. vs. Vulcan Iron Works, 52 Fed. Rep. 920. The rule in this case was applied, however, because the plaintiff in replevin had removed the property pending the trial, thus afford-

The costs of the replevin action, including attorney's fees in defending it, may be recovered upon the bond.²⁶³

Interest may be recovered from the date of judgment in replevin to the termination of the suit on the bond,²⁶⁴ even though the interest increases the amount of recovery beyond the penalty named in the bond.²⁶⁵

The affidavit of replevin is prima facie evidence of the value of the goods replevied.^{265a}

§215. Defenses in action on replevin bonds.

The judgment in replevin being conclusive upon the sureties as to all matters necessary to be adjudicated in determining that action,²⁶⁶ there remains a limited range of defenses in an action on the bond other than those which relate to the validity of the undertaking.²⁶⁷

The sureties may avail themselves of the defense arising from a material alteration in the bond,²⁶⁸ or a dismissal of the replevin action with the consent of the defendant,²⁶⁹ or where the judgment in replevin has been satisfied, or for some cause is no longer subsisting and in force,²⁷⁰ or where there has been a

ing no opportunity for ascertaining the value at the time of the trial.

See also *Kaufman vs. Seaboard Air Line Ry.* 73 S. E. 592; 10 Ga. App. 248.

But see *Werner vs. Graley*, 54 Kan. 383; 38 Pac. 482. Holding the measure of damages to be the value at the time and place the property was taken.

See also *Bank vs. Hall*, 107 Pa. 583; *Manning vs. Manning*, 26 Kan. 98. It is held that where the replevin action is tried on its merits with an opportunity for assessing damages that a failure to make such assessment will bar a recovery on the bond. *Morrison vs. Yancey*, 23 Mo. App. 670; *Ihrig vs. Russell*, 122 P. 608; 68 Wash. 70.

²⁶³ *Harts vs. Wendell*, 26 Ill. App. 274; *Richardson vs. Gilbert*, 135 Ill. App. 363; *Moore vs. Beech Co.*, 221 Ill. App. 609.

Kansas courts, distinguishing replevin actions from those of attachment and injunction, hold that in the absence of malice, want of probable cause or bad faith on the part of the plaintiff, attorney's fees and expenses incurred in defending the

replevin suit, are not recoverable under a bond reciting "and pay all costs and damages that may be awarded against him." *Lake vs. Hargis*, 82 Kan. 711; 109 Pac. 670.

Contra—*Trimble vs. Keer-Rountree Mer. Co.*, 56 Mo. App. 683; *Carraway vs. Wallace*, 17 Sou. Rep. (Miss.) 930; *Maguire vs. Pan-American Amusement Co.*, 205 Mass. 64; 91 N. E. 135.

²⁶⁴ *Leighton vs. Brown*, 98 Mass. 516; *Brainard vs. Jones*, 18 N. Y. 35.

²⁶⁵ *Wyman vs. Robinson*, 73 Me. 384.

Contra—*Fraser vs. Little*, 13 Mich. 198.

^{265a} *Richardson vs. Gilbert*, 135 Ill. App. 363.

See also *Bierce vs. Waterhouse*, 219 U. S. 320.

²⁶⁶ Ante Sec. 230.

²⁶⁷ Ante Sec. 228.

²⁶⁸ *Martin vs. Thomas*, 24 How. 316.

²⁶⁹ *Casper vs. Kent Circuit Judge*, 45 Mich. 251; 7 N. W. 816.

²⁷⁰ *Blackburn vs. Crowder*, 108 Ind. 238; 9 N. E. 108.

change of defendants by a substitution of a new party.²⁷¹ These defenses, of course, are not peculiar to sureties on replevin bonds, but are such as apply to any form of bond given in the course of a judicial proceeding.

It is held that while certain defenses can not be urged as a bar to an action on the bond, yet they may be pleaded in mitigation of damages, thus, where partnership assets were levied upon in execution by a creditor of an individual partner, and replevined by the co-partner, and the latter failed to maintain his action; in a suit upon the bond, the defense was admitted in mitigation of damages, that the partnership was insolvent and that its affairs had not been wound up, and that the creditor's execution would therefore have availed him nothing.²⁷²

So also, where the original action failed for some cause not involving the merits, such as a premature starting of the replevin suit, these facts may be shown in mitigation of damages although not a bar to the action.²⁷³

Where the property taken in replevin increases in value during the detention by reason of the addition of labor to the property, such increased value, if added in good faith, and the property returned, may be set off in mitigation of damages.²⁷⁴

It is no defense to an action on a replevin bond that the property has been destroyed by unavoidable casualty pending the final action, and that the plaintiff on that account can not re-

²⁷¹ Vinton vs. Mansfield, 48 Conn. 474; Williams vs. St. L., I. M. & S. Ry., 8 Mo. App. 135.

In Union Trust Co. vs. Shoemaker, 101 N. E. 1050; 258 Ill. 564, it is said: "A replevin bond is intended to indemnify the party actually interested at the time the judgment shall be recovered, against the wrongful prosecution of the supposed cause of action, and the possible exercise of the court's power of amendment and the substitution of parties are within the contemplation of the obligors when the bond was executed."

See also Hanna vs. International Petroleum Co., 23 O. S. 622; Becovitz vs. Saperstein, 46 Ind. App. 339; 92 N. E. 551.

Contra—First Commercial Bank vs. Valentine, 209 N. Y. 145; 102 N. E. 544.

²⁷² Hacker vs. Johnson, 66 Me. 21.

²⁷³ Davis vs. Harding, 3 Allen 302.

See also Hertz vs. Kaufman, 46 Ill. App. 591. In Illinois the statute provides that where the merits of the case were not determined in replevin, the defendants in an action upon the bond may plead the question of title.

O'Donnell vs. Colby, 153 Ill. 324; 38 N. E. 1065. The dismissal of the replevin action for lack of jurisdiction, while not a bar to an action on the bond, may be set up in mitigation of damages. Robinson vs. Teefer, 10 Ind. App. 698; 38 N. E. 222; Klaproth vs. Greenberg, 147 Ill. App. 380; Bailey vs. Dennis, 135 Mo. App. 93; 115 S. W. 506.

²⁷⁴ State vs. Shelvin-Carpenter Co., 62 Minn. 99; 64 N. W. 81. If the property is not returned and recovery is had for the value, the in-

turn the property.²⁷⁵ But when the return of the property is made impossible by reason of a subsequent seizure under a process of law the sureties upon a replevin bond are not liable.²⁷⁶

§216. Bonds given in the course of the administration of estates of deceased persons.

Executors, administrators or guardians might with some propriety be classified as public officers. They perform functions of a public character and give bond to the State for the benefit of all persons interested in the administration of their trust. Their duties, however, are performed as officers of the court, under the direct supervision of the court, and unlike public officers in general, they do not for themselves determine their own course of action in accordance with their own interpretation of the law, but at all times are guided by the decrees and orders of the court.

Their position as ministerial officers of the court imposes special obligations which do not arise in the case of public officers whose duties are fully prescribed by Statute.

Public officers give bond to faithfully administer their office according to law. Judicial officers undertake to perform the duty pointed out by the Statutes, and also to obey the orders of the court.

Suretyship as related to this branch of the public service not only involves the fidelity of one charged with the execution of a trust, but also the varying and uncertain contingencies arising in contested legal proceedings.

§217. Duties for which executors and administrators are chargeable on their bonds.

If the decedent by his last will and testament points out the way in which the estate is to be administered, it is the duty of the administrator to follow the plan thus laid down, and his

creased value by reason of the addition of labor cannot be recovered. *Busch vs. Fisher*, 89 Mich. 192; 50 N. W. 788.

²⁷⁵ *Suppiger vs. Gruaz*, 137 Ill. 216; 27 N. E. 22; *Capen vs. Bartlett*, 153 Mass. 346; 26 N. E. 873.

²⁷⁶ *Caldwell vs. Jans*, 1 Mont. 570.

bond is liable for his failure to so administer the estate. If he assumes to act upon his own interpretation of the meaning of the will or the provisions of the law applicable to decedent's estates, he does so at the peril of himself and his sureties, and however reasonable his course of action may be, and notwithstanding he acts with the utmost good faith, if he mistakes the law, he must abide the judgment of the court, and such judgment may be enforced by recourse upon his bond.

Administration trusts in many cases are involuntary. This is nearly always so as far as the beneficiaries are concerned, and the care and custody of property by operation of the law regulating the settlement of estates is placed in the control of these officers without the consent of those to whom it belongs. The trustee must be held to the full measure of diligence and fidelity which a prudent man bestows upon his own affairs.

An administrator can not justify for a failure to perform an order of the court or to observe the regulations of the statute. He is clothed with no discretion in this respect, and whether the order or the Statute is reasonable or not, and whether it subserves the interest of the estate or not, it is nevertheless a duty which by the terms of the bond must be observed.

It is no justification that the officer was advised by his counsel to do the wrongful act, although the advice was given in good faith and was apparently sound.²⁷⁷

The administrator is chargeable for negligence and bad judgment in investing funds of the estate where he assumes to act without order of the court or special direction of the will,²⁷⁸

²⁷⁷ Bourne vs. Stevenson, 58 Me. 499.

²⁷⁸ Johnston vs. Maples, 49 Ill. 101; Probate Judge vs. Mathes, 60 N. H. 433; Baer's Appeal, 127 Pa. 360; 18 Atl. 1.

The administrator deposited the trust funds in a bank, taking therefor a certificate of deposit at 4 per cent. interest payable in twelve months, and the bank failed before the expiration of the time, held to

create a liability on the bond. The Court said: "The question of good faith on the part of the administrator and his counsel in making the deposit does not arise, because it cannot change the result. No one can doubt that so far as they were concerned the highest integrity and utmost good faith characterized the transaction. It is simply an instance of misplaced confidence, unfortunate in its consequences, but

and the bond will be liable for the failure of the administrator to resist the allowance of unjust claims against the estate,²⁷⁹ as well as for his failure to pay claims which have been allowed, where sufficient funds are in his hands for that purpose. A refusal to pay a claim under these circumstances is equivalent to a conversion of the funds to his own use.²⁸⁰

So also, a failure by the administrator to pay over to an heir the amount of his distributive share is a breach of the bond, and the heir need not first exhaust the funds of the estate.²⁸¹ The same liability arises for failure to pay the widow the amount allowed by the court.²⁸²

The failure by the administrator to properly observe the order of preference in the distribution of the assets, whereby the funds of the estate are exhausted, leaving unpaid claims entitled to preference, raises a liability against the bond.²⁸³ Likewise the payment in unequal proportions of claims in the same class creates a liability on the bond in favor of those creditors who do not receive their pro rata share.²⁸⁴

The neglect of an administrator to file his account for an unreasonable time has been held to be a constructive conversion of the assets shown in the inventory, for which the sureties upon the bond are chargeable.²⁸⁵

Where the administrator filed no inventory and made no

which must nevertheless be disposed of according to the plain legal rules which govern all similar cases."

²⁷⁹ *Smith vs. Cuyler*, 78 Ga. 654; 3 S. E. 406; *Gold vs. Bailey*, 44 Ill. 491.

²⁸⁰ *State vs. James*, 82 Mo. 509; *Pence vs. Makepeace*, 75 Ind. 480; *Thayer vs. Clark*, 48 Barb. 243; *Brewster vs. Balch*, 41 N. Y. Super. Ct. 63; *Weber vs. North*, 51 Iowa 375; 1 N. W. 652.

But see *Robinson vs. Hodge*, 117 Mass. 222.

²⁸¹ *Stanton vs. State*, 82 Ind. 463;

Shriver vs. Reister, 65 Md. 278; 4 Atl. 679; *Ralston vs. Wood*, 15 Ill. 159.

²⁸² *Choate vs. Jacobs*, 136 Mass. 297.

Contra—Rocco vs. Cicalla, 59 Tenn. 508.

²⁸³ *Worthy vs. Brower*, 93 N. C. 344; *State vs. Brown*, 80 Ind. 425.

²⁸⁴ *Evans vs. Taylor*, 60 Tex. 422.

²⁸⁵ *Webb vs. Gross*, 79 Me. 224; 9 Atl. 612; *McKim vs. Bartlett*, 129 Mass. 226.

accounting of his trust, it was considered a breach for which action would lie on the bond.²⁸⁶

§218. The scope of the administration bond covers all assets and equities of the estate.

The law requires the administrator to faithfully administer the estate, and the bond covers all the requirements of the law except when restricted by words of special limitation.

The undertaking covers all the assets, whether they come into the hands of the officer before or after the execution of the bond.²⁸⁷ Even though the conversion takes place before the execution of the bond the sureties will be liable. Thus, where sureties on motion were released from a bond and a new bond substituted, but the assets of the estate had been wasted before the execution of the last bond, it was held: "The discharge of this obligation required that the executor should administer the estate as required by the law and the will, or deliver it to his successor to be so administered, should he resign or be removed. The fact that prior to executing the bond he had converted the assets to his own use, in no way affected the obligation to account for all that had been received by him belonging to the estate; and it was to secure this obligation that the bond was required and given."²⁸⁸

²⁸⁶ Ellis vs. Johnson, 83 Wis. 394; 53 N. W. 691.

By statute in Massachusetts an administrator of an insolvent estate is required to make a representation of that fact to the Probate Court. Where such an administrator failed to file an inventory or account and permitted a creditor to obtain a judgment which remained unsatisfied, it was held to be a breach of the bond rendering the sureties liable to the full extent of the claim of the creditor, notwithstanding the deceased may have in fact left no estate. McIntyre vs. Parker, 80 N. E. 798; 195 Mass. 155; Forbes vs. McHugh, 152 Mass. 412; 25 N. E. 622.

²⁸⁷ Choate vs. Arrington, 116 Mass. 552; Bellinger vs. Thompson, 26 Oregon 320; 37 Pac. 714; 40 Pac. 229; State vs. James, 82 Mo. 409.

But see Parmele vs. Brashers, 16 La. (O. S.) 72. The liability

against the sureties is limited to money or property which actually comes into the hands of the administrator. Statements by the officer in his reports to the court, charging himself with assets which he never received, will not be conclusive of the fact against the sureties. State vs. Elliott, 157 Mo. 609; 57 S. W. 1087.

²⁸⁸ Foster, Admx., vs. Wise, Admr., 46 O. S. 26; 16 N. E. 687. The surety against whom recovery was had in this case subsequently brought a claim against the sureties of the former bond which was in force at the time the *devastavit* occurred, and it was held that as between the different sets of sureties, the entire burden should fall upon those who had executed the prior bond. Corrigan vs. Foster, Admx., 51 O. S. 225.

See also Pinkstaff vs. The People, 59 Ill. 148. "Whether he had, in

The sureties upon the bond will be liable for the conversion of funds collected by the administrator under color of his office, but which are not properly assets of the estate, and which he would not be bound to collect and distribute.²⁸⁹

The general administration bond covers all the duties of the officer in reference to the land of the decedent. If he is charged by the will with the care and management of the real estate, or with the sale of it to pay debts or legacies, the sureties will be liable for misappropriation or maladministration, notwithstanding the Statute gives no authority to the officer touching the land.²⁹⁰

If the executor or administrator is also a debtor of the estate, the amount of his debt at once becomes an asset in his hands, and he must account for it on his bond,²⁹¹ although in some jurisdictions the rule prevails that the bond is not liable

fact, used the trust funds or not, when this (the second) bond was given, they were, in the eye of the law then in his hands to be administered, and the bond was given as security that they should be so administered."

In *Scotfield vs. Churchill*, 72 N. Y. 565, where the condition of the bond was "to faithfully execute the trust reposed in him as executor," it was held that the bond was to secure any improper use of the funds belonging to the estate without regard to the time of its occurrence. *Elizalde vs. Murphy*, 163 Cal. 681; 126 Pac. 928.

²⁸⁹ In *re Hobson*, 61 Hun 504; 16 N. Y. S. 371; *Wiseman vs. Swain*, 114 S. W. 145.

But see *Warfield vs. Brand*, 76 Ky. 77; *Orrick vs. Vahey*, 49 Mo. 428; *Pace vs. Pace*, 19 Fla. 438.

The tendency of the later cases is toward relieving the surety from liability in those cases where the administrator has misappropriated funds which are not strictly assets of the decedent's estate. The sureties guaranty the fidelity of the principal only in his representative capacity, and not in his individual capacity. *Probate Court vs. Williams*, 73 A. 382; 30 R. I. 144; *Campbell vs. American Bonding Co.*, 55 So. 306; 172 Ala. 458; *People vs. Petrie*, 191 Ill. 497; 61 N. E. 499; *Jester vs. Gustin*, 158 Ind. 287; 63 N. E. 471; *Salter vs. Sutherland*, 123 Mich. 225; 81 N. W. 1070.

Even where a policy of life in-

surance was made payable to the "executors, administrators or assigns," and the proceeds were paid over to the administrator; the sureties on his bond were held not liable for his failure to pay it over, since by law the proceeds of the policy were payable to the widow and children, and therefore were not a part of the estate of the assured for which as administrator he was obliged to account. *Bradford vs. Watson*, 62 So. 484; 65 Fla. 461. See also *People vs. Petrie*, 61 N. E. 499; 191 Ill. 497.

²⁹⁰ *Dix vs. Morris*, 1 Mo. App. 93. But see *White vs. Ditson*, 140 Mass. 351; 4 N. E. 606. Where it is held that the sale of real estate without order of court but under the authority of the will, the sale not being necessary to pay debts, that the sureties were not liable for the conversion of the proceeds of the sale.

See also *Newport Probate Court vs. Hazard*, 13 R. I. 3.

²⁹¹ *Winship vs. Bass*, 12 Mass. 199; *Wright vs. Lang*, 66 Ala. 389; *Lambrecht vs. State*, 57 Md. 240; *Kealhofer vs. Emmert*, 79 Md. 248; 29 Atl. 68; *McGaughey vs. Jacoby*, 54 O. S. 487; 44 N. E. 231; *Twitty vs. Houser*, 7 S. C. 153; *Arnold vs. Arnold*, 124 Ala. 550; 27 So. 465; *Bassett vs. Fidelity Co.*, 184 Mass. 210; 68 N. E. 205; *Crow vs. Conant*, 90 Mich. 247; 51 N. W. 450.

In California the Statute (Code Civ. Proc., Sec. 1447) expressly provides that debts due the testator by the executor shall be considered as

if the administrator is insolvent, and that the sureties will be held to no greater responsibility for debts due from the officer than for debts due from third persons.²⁹²

Where a surety of a defaulting administrator was made his successor in office, the amount of his liability on the bond of the former administrator was considered an asset in his hands, for which his bond was holden.²⁹³

Where it appeared that the surety was induced to sign the bond of an insolvent administrator as a part of a fraudulent scheme to make him liable to the beneficiary of the state upon a debt owing by the administrator, the court declined to apply the rule.²⁹⁴

The collection of rents accruing upon lands of the decedent is in the right of the heirs, and the collections do not become assets in the hands of the administrator, and the sureties are not liable for the failure of the officer to account for such rents.²⁹⁵

The expenses of administration are not chargeable against the bond. Debts contracted by the administrator do not bind the estate, but the officer individually, and if unpaid do not constitute a breach of his trust.²⁹⁶ It is held, however, that where the court has allowed attorney fees and entered an order for their payment that it becomes a charge against the estate, and a failure to comply with the order is a breach of the bond.²⁹⁷

§219. Successive administration bonds are cumulative.

All the bonds given during the continuance of the trust are cumulative.²⁹⁸ Where the Statute provided that the giving of

money in his hands belonging to the estate, and in *Treweek vs. Howard*, 105 Cal. 434; 39 Pac. 20, it was held that the sureties were liable for moneys embezzled from the testator while the executor was acting as his agent, of which the sureties had no knowledge at the time of the execution of the bond.

See also *Sanchez vs. Foster*, 65 Pac. 1077; 133 Cal. 614.

²⁹² *Bancus vs. Barr*, 45 Hun 582; affirmed, 107 N. Y. 624; 13 N. E. 939; *Harker vs. Irick*, 10 N. J. Eq. 269; *Spurlock vs. Earles*, 67 Tenn. 437; *Lyon vs. Osgood*, 58 Vt. 707; 7 Atl. 5; *State vs. Gregory*, 119 Ind. 503; 22 N. E. 1; *McCarty vs. Frazer*, 62 Mo. 263; *State vs. Morrison*, 244 Mo. 193; 148 S. W. 907; *McEwen vs. Fletcher*, 146 N. W. 1.

In *Gay vs. Grant*, 101 N. S. 206; 8 S. E. 99 and 106, it was held that

the sureties were liable where the administrator was able to pay his debt, but was insolvent in that his property was not subject to legal process.

²⁹³ *Choate vs. Thorndike*, 138 Mass. 371.

²⁹⁴ *Campbell vs. Johnson*, 41 O. S. 588.

²⁹⁵ *State vs. Barrett*, 121 Ind. 92; 22 N. E. 969; *Smith vs. Bland*, 46 Ky. 21; *Hutcherson vs. Pigg*, 8 Grat. 220; *U. S. F. & G. Co. vs. Russell*, 141 Ky. 601; 133 S. W. 572. *Contra*—*Dix vs. Morris*, 66 Mo. 514.

²⁹⁶ *Taylor vs. Mygatt*, 26 Conn. 184; *Baker vs. Moor*, 63 Me. 443; *Carter vs. Young*, 77 Tenn. 210.

²⁹⁷ *State vs. Walsh*, 67 Mo. App. 348.

²⁹⁸ *Pickens vs. Miller*, 83 N. C. 543; *Dugger vs. Wright*, 51 Ark.

an additional bond shall discharge the sureties as to defaults committed after the filing of the new bond, it was held that the new bond was nevertheless cumulative and liable for the defaults occurring before its execution.²⁹⁹

It is held that the giving of an additional bond required by Statute in a land sale proceeding for the purpose of paying debts, does not render the sureties of the second bond liable for any defaults outside of the funds resulting from the sale of the land.³⁰⁰

A bond given upon a grant of ancillary administration is not cumulative with the bond given in the jurisdiction of the principal administration, and the sureties upon the former are not liable to a creditor who has proved his claim in the latter or principal jurisdiction.³⁰¹

§220. As to whether judgment or order of court against the principal is necessary to a cause of action on the administration bond.

If the law makes it the duty of the officer to pay a legacy or a claim, and does not require an order of the court as a necessary step in the payment, an action may be had on the bond without an order of court directing payment. Thus, where the will directs the payment of a legacy it becomes the duty of the officer to pay out the legacy, if there are sufficient funds, and an action may be maintained upon the bond without an order of court being made.³⁰²

So where no formal order is required to enable the adminis-

232; 11 S. W. 213; *Lingle vs. Cook*, 32 Grat. 262; *Lane vs. State*, 24 Ind. 421; *Modawell vs. Hudson*, 80 Ala. 265. In this case the administrator resigned and became his own successor with a new bond, held—that the distributees may charge either set of sureties at their election.

See also *Lacoste vs. Splivalo*, 64 Cal. 35; 30 Pac. 571; *Central Banking & Security Co. vs. U. S. F. & G. Co.*, 80 S. E. 121.

²⁹⁹*State vs. Berning*, 74 Mo. 87.

³⁰⁰*Salvers vs. Ross*, 15 Ind. 130.

But see *Powell vs. Powell*, 48 Cal. 234.

³⁰¹*Probate Court vs. Brainard*, 48 Vt. 620.

³⁰²*Gould vs. Steyer*, 75 Ind. 50.

It is held that a residuary legatee cannot recover upon the administration bond until the amount of the residuum is adjudicated by the Probate Court and ordered paid. *Jones vs. Irvine*, 23 Miss. 361.

trator to make a final distribution to creditors, a failure to do so is a breach of the bond and action may be brought without first obtaining an order of distribution.³⁰³

It is the duty of an administrator to pay over to his successor in office the amount found due upon the final settlement of his accounts, and an action can be maintained upon his bond by the administrator *de bonis non* without the entry of an order of court requiring payment.³⁰⁴

If the claim against the estate, whether that of a creditor or legatee, is in dispute or unliquidated, no action can be instituted on the bond for its recovery until the amount is first determined either by a judgment or an allowance by the administrator. The sureties are under no obligation to render an accounting, but only to pay the balance found due upon an accounting.³⁰⁵

A claim against the administrator for *devastavit* or *maladministration* is not chargeable upon the bond until reduced to a judgment against the officer.³⁰⁶

If judgment has been entered against the administrator, it is not necessary to have execution on the same and a return of *nulla bona* before instituting action on the bond.³⁰⁷

³⁰³ *Municipal Court of Providence vs. Henry*, 11 R. I. 563.

But see *Probate Court vs. Kent*, 49 Vt. 380.

It has been held that where an estate of a deceased person is in process of settlement in the Probate Court and there has been no refusal by the administrator to make a final accounting, that an action cannot be maintained on the bond until there has been an accounting in the proper tribunal. *Hudson vs. Barratt*, 62 Kas. 137; 61 Pac. 737.

³⁰⁴ *Balch vs. Hooper*, 32 Minn. 158; 20 N. W. 124; *State vs. Porter*, 9 Mo. 356; *Fossbender vs. American Surety Co.*, 122 N. Y. S. 442; *Toffer vs. Kesinger*, 80 Kan. 549; 102 Pac. 1097.

³⁰⁵ *Judge of Probate vs. Couch*, 59 N. H. 39; *Young vs. Duhme*, 61 Ky. 239; *Dinkins vs. Bailey*, 23

Miss. 284; *Weihe vs. Statham*, 67 Cal. 84; 7 Pac. 143; *Tudheyse vs. Potts*, 91 Mich. 490; 51 N. W. 1110; *Hudson vs. Barratt*, 62 Kan. 137; 61 Pac. 737; *Pennington vs. Newman*, 129 Pac. 693; 36 Okl. 594.

³⁰⁶ In some jurisdictions it is provided by Statute that action may be brought on the bond for *maladministration* without a prior judgment of *devastavit*.

Giles vs. Brown, Administrator, 60 Ga. 658; *Whitfield vs. Evans*, 56 Miss. 488; *People vs. Admire*, 39 Ill. 251; *Decker vs. Decker*, 3 Alaska 121.

³⁰⁷ *McCalla vs. Patterson*, 57 Ky. 201; *Commonwealth vs. Dill*, 1 Phila. Rep. 556; *Governor vs. Chuteau*, 1 Mo. 771; *Hood vs. Hayward*, 124 N. Y. 1; 26 N. E. 331.

Contra—*Seegar's Ex'rs vs. State*, 5 Har. & J. (Md.) 488.

§221. The sureties upon the bond of an administrator are concluded by judgment against the principal.

In the absence of mistake or fraud, a judgment by a court of competent jurisdiction against the principal is conclusive against the sureties upon his bond.^{307a} If such judgment or decree arise in the settlement of the officer's accounts the amount so found due will be binding upon the sureties even though they were not parties to the settlement and had no notice of it.³⁰⁸

Such judgment is also conclusive in favor of the sureties, and claimants are estopped from showing in an action on the bond that the amount due is in excess of the judgment against the principal.³⁰⁹

A judgment fixing the amount of a legacy and ordering it paid is binding on the sureties in an action on the bond.³¹⁰ The sureties are not concluded from showing that the order or judgment against the principal was obtained by fraud and collusion on the part of the principal.³¹¹

It is held that a judgment by confession against the administrator is only *prima facie* evidence against his sureties.³¹²

Where an administrator, in attempting to make a contract on behalf of the estate, has exceeded his authority, and has suffered a judgment to be rendered against him as a result of such transaction, the sureties will not be estopped to deny the validity of the judgment.^{312a}

^{307a} Shipman vs. Brown, 130 Pac. 603; 36 Okl. 623.

³⁰⁸ Grimmet vs. Henderson, 66 Ala. 521; Martin vs. Tally, 72 Ala. 23; George vs. Elms, 46 Ark. 260; Irwin vs. Backus, 25 Cal. 214; Nevitt vs. Woodburn, 160 Ill. 203; 43 N. E. 385; Clark vs. Fredenburg, 43 Mich. 263; 5 N. W. 306; Kelly vs. West, 80 N. Y. 139; Harrison vs. Clark, 87 N. Y. 572; Power vs. Burmaster, 34 N. Y. S. 716; State vs. Creusbauer, 68 Mo. 254; Slagle vs. Entrekin, 44 O. S. 637; 10 N. E. 675; Ordinary vs. Kershaw, 14 N. J. Eq. 527; Stovall vs. Banks, 10 Wall. 583; Wiseman vs. Swain, 114 S. W. 145; McDonald vs. The People, 222 Ill. 325; 78 N. E. 609; Sjoli vs. Hagenson, 122 N. W. 1008; 19 N. D. 82; McDonald v. State of

Illinois, 222 Ill. 325; 78 N. E. 609; Briggs vs. Manning, 80 Ark. 304; 97 S. W. 289; Weyant vs. Utah Savings Trust Co., 54 Utah 181, 182 Pac. 189, 190 note.

Contra—Lipscomb vs. Postell, 38 Miss. 476.

³⁰⁹ Crouch vs. Edwards, 52 Ark. 499; 12 S. W. 1070; Sabrinos vs. Chamberlain, 76 Tex. 624; 13 S. W. 634; Proctor vs. Dicklow, 57 Kan. 119; 45 Pac. 86.

See also U. S. F. & G. Co. vs. Russell, 141 Ky. 601; 133 S. W. 572.

³¹⁰ State vs. Berning, 74 Mo. 87.

³¹¹ Annett vs. Terry, 35 N. Y. 256.

³¹² Kearney vs. Sascer, 37 Md. 264; Seat vs. Cannon, 20 Tenn. 471.

^{312a} Curtis vs. National Bank, 39 O. S. 579; Thompson vs. Mann, 65 W. Va. 648; 64 S. E. 920.

§222. Defenses to action upon administration bonds.

Any order or judgment discharging the administrator from liability will release the sureties on the bond.³¹³ So also, a discharge of a co-surety will discharge the remaining surety.³¹⁴

The consent of the distributees to the irregularities of the administration from which the loss arises, will be a bar to an action on the bond, as where the administrator uses the funds of the estate in his private business with the knowledge and consent of the beneficiaries of the estate.³¹⁵

Where the administrator executes his individual note to the distributee, which is accepted as payment, the sureties upon his bond are not liable for his non-payment of the note.³¹⁶

If the person who is administrator occupies a double trust, and is entitled to receive the fund in a trust capacity as the distributee of the estate, the law will make the transfer whenever the payment becomes due, and relieve the sureties of the administrator. Thus, if one is acting both as administrator and guardian, as soon as the amount due to him as guardian is definitely ascertained, it will be deemed paid, and the guardian bond and not the administration bond will thereafter be liable for the conversion of the fund.³¹⁷

³¹³ Austin vs. Raiford, 68 Ga. 201; Tucker vs. Stewart, 147 Iowa 294; 126 N. W. 183.

Contra—U. S. F. & G. Co. vs. The People, 159 Ill. App. 35; People vs. Rardin, 171 Ill. App. 226.

³¹⁴ State vs. Barrett, 121 Ind. 92; 22 N. E. 969.

³¹⁵ Rutter vs. Hall, 31 Ill. App. 647; Forbes vs. Keyes, 193 Mass. 38; 78 N. E. 733.

³¹⁶ Hubbard vs. Ewing, 63 Tenn. 404; Riffin vs. Creath, 60 O. S. 114; 53 N. E. 1100. In this case the distributee accepted the individual check of the executor and gave a receipt in full; held, *Schauck, J.*: "In lieu of payment in cash or by the check of the executors upon the trust fund, she voluntarily and for purposes of her own accepted the individual check of Riffin upon a different bank for the balance, and in consideration of that check and the advancements previously made to her, she executed to the executors, for the purpose of their settlement, her receipt for the entire distributive share, from which it re-

sulted that by her authority the portion of the trust fund which she had been entitled to receive was delivered to Riffin and lost to the fund. In executing his individual check upon the Farmers' Bank, Riffin acted wholly apart from his duties as executor. He did not execute it as executor, nor in any way represent that it would be paid out of money subject to the control of the executors. It follows that whatever may have been Mrs. Creath's reason for preferring the individual check of Riffin to that of the executors, she was the sole judge of its sufficiency, and she is bound by her election, and estopped to maintain an action on the bond because of the non-payment of the check which she chose to receive."

But see Hoge vs. Vintroux, 21 W. Va. 1.

³¹⁷ Ruffin vs. Harrison, 81 N. C. 208; Bell vs. People, 94 Ill. 230; State vs. Cheston, 51 Md. 352; Odell vs. Howle, 77 Va. 361.

But see Smith vs. Gregory, 26

If an executor conforms to the requirements of the will, his acts will be deemed valid even though the will is thereafter set aside, and his sureties are not liable for his failure to restore the assets legally disposed of before the will was nullified.³¹⁸

The sureties upon an administration bond cannot defend upon the ground that the appointment of the principal was irregular, as where the letters were issued from the wrong county.³¹⁹

§223. Who may maintain action on administration bonds.

If an administrator is removed or for any other cause the office becomes vacant, the common law confers upon his successor

Grat. (Va.) 248; *Burton vs. Anderson*, 5 Har. (Del.) 221.

In *Wilson vs. Wilson*, 17 O. S. 150, it was held that where a party is acting in a double capacity, and is possessed of a fund in one capacity which it is his duty to transfer to himself in another, that such transfer will be presumed, the Court said, "But this legal presumption may be rebutted. It is a kind of legal fiction; and legal fictions have vitality and effect to promote the ends of justice, but not to thwart them. Wilson was not required to go through any such foolish formality as taking the fund which he held as administrator from one pocket and putting it into another as guardian; but there were other and more sensible ways of indicating the capacity in which he regarded himself as holding the fund. He might legitimately have charged himself with it in his account as guardian, and credited himself with having made payment of it to the guardian in his account as administrator. But he did just the contrary to this. He refrained from charging himself with it as guardian, and thus, it would seem, prevented its forming any element of recovery against him in the former action against him and his sureties on the bond as guardian.

. . . . We are of the opinion that these unequivocal manifestations of intention on the part of the principal defendant, Wilson, effectually rebut the legal presump-

tion which his counsel invoke in his behalf; estop him to deny that he holds the fund in his capacity as administrator."

In *Potter vs. Ogden*, 136 N. Y. 384, it is held: "The sureties upon an administrator's bond remain liable until they can show payment by him to the parties legally entitled to receive the assets, and when the sole defense to an action upon the bond is the technical and constructive transfer of liability from the administrator as such to himself as guardian, this must be clearly established, so as to leave no doubt of the liability of the sureties upon his bond as guardian."

To the same effect see *State vs. Whitehouse*, 80 Conn. 111; 67 Atl. 503; *State vs. Branch*, 134 Mo. 592; 36 S. W. 226; *In re Switzer*, 201 Mo. 66; 98 S. W. 461.

³¹⁸ *Jones vs. Jones*, 53 Ky. 373.

But see *Crow vs. Crow*, 53 Ky. 383. In this case an action to contest the will was begun the day the administrator was appointed, and it was held that the sureties were liable for the failure of the administrator to return to the estate assets distributed before the decree nullifying the will was entered.

³¹⁹ *McChord vs. Fisher*, 52 Ky. 193.

See also *Foster vs. Commonwealth*, 35 Pa. 148; *State vs. Anderson*, 84 Tenn. 321; *Hoffman, Admx., vs. Fleming*, 66 O. S. 143; 64 N. E. 63; *Elizalde vs. Murphy*, 163 Cal. 681; 126 Pac. 981.

title to the unadministered assets. This includes only such property as remains in specie and the debts due the estate from the debtors of the decedent. If the prior administrator has converted to his own use any part of the estate, the administrator *de bonis non* has no cause of action on a bond of his predecessor to recover his shortage, except where such authority is specially conferred by statute.³²⁰ The sureties upon the bond are liable, however, to the creditors and legatees, and such distributees may maintain action,³²¹ and the same right accrues to the heirs.³²²

A co-administrator who has executed a joint bond with the other administrator may maintain an action on the bond for the conversions of his associate. He may recover on the bond in his representative capacity, notwithstanding that he might afterwards be called upon individually to respond to his sureties upon his obligation of indemnity, as one of the principals in the bond.³²³

§224. Bonds of guardians — Scope of liability.

A guardian of a minor ward undertakes that he will protect the person and property of the beneficiary, obey the orders of the court in reference thereto, and render due account of the trust fund and of all his acts touching the duties of his office; and he is required by law to execute a bond conditioned for the faithful performance of all the obligations which the trust imposes.

In accepting such office, he stipulates by legal implication, that he is fit and capable of managing the business affairs of his ward, and his bond is liable if such implied representation is not true.

³²⁰ *United States vs. Walker*, 109 U. S. 258; 3 S. Ct. 277; *In re Assignment of Richart*, 58 Ill. App. 91; *Johnson vs. Hogan*, 37 Tex. 77; *Court of Probate vs. Smith*, 16 R. I. 444; 17 Atl. 56. The administrator *de bonis non* is in many States specifically authorized by Statute to maintain action on the bond. *Tulburt vs. Hollar*, 102 N. C. 406; 9 S. E. 430; *Banks vs. Speers*, 103 Ala.

436; 16 South. 25; *Waterman vs. Dockray*, 78 Me. 139; 3 Atl. 49; *People vs. Pacific Surety Co.*, 130 Ill. App. 502.

³²¹ *Commonwealth vs. Rogers*, 53 Pa. 470.

³²² *Goux vs. Moucla*, 30 La. Ann. 743; *State vs. Campbell*, 10 Mo. 724.

³²³ *Sperb vs. McCoun*, 110 N. Y. 605; 18 N. E. 441.

See also *Nanz vs. Oakley*, 120 N. Y. 84; 24 N. E. 306.

If he makes an improvident loan of moneys belonging to the trust fund, taking insufficient security, the bond will be chargeable.³²⁴

The guardian undertakes the responsibility for all the property belonging to the ward, whether derived from the estate of the ancestor of the ward or from any other source,³²⁵ and the sureties are liable, as in the case of an executor or an administrator,³²⁶ even though the money or property comes into the hands of the guardian before the execution of the bond,³²⁷ and is converted in whole or in part prior to the date of the bond.³²⁸

A special bond given by requirement of law to secure the proceeds of a sale of land belonging to the ward, is not cumulative with the general bond of guardianship, neither will the general bond be liable for conversions of the special fund.³²⁹

³²⁴ *Richardson vs. Boynton*, 12 Allen 138; *Lee vs. Lee*, 67 Ala. 406. In this case it was held that the sureties are liable for loans made without security, even though the borrower was entirely solvent at the time the loan was made.

See also *Bell vs. Rudolph*, 70 Miss. 234; 12 South. 153.

³²⁵ *Carr vs. Askew*, 94 N. C. 194.

The surety in a general guardianship bond is liable for money paid to the guardian in condemnation proceedings. *Mann vs. Mann*, 119 Va. 630, 89 S. E. 897.

³²⁶ *Ante*, Sec. 235.

³²⁷ *Merrells vs. Phelps*, 34 Conn. 109; *Bockenstead vs. Perkins*, 73 Iowa 23; 34 N. W. 488; *Knox vs. Kearns*, 73 Iowa 286; 34 N. W. 861; *State vs. Bilby*, 50 Mo. App. 162.

³²⁸ *Douglass vs. Kessler*, 57 Iowa 63; 10 N. W. 313; *Fogarty vs. Ream*, 100 Ill. 366.

Contra—*State vs. Shackelford*, 56 Miss. 648.

In *Aetna Indemnity Co. vs. State*, 101 Miss. 703; 57 So. 980, it was held that where a guardian, while acting under his first bond, converted moneys of his ward, and after the discharge of the first bond, and the giving of a new bond, though then solvent and able to pay the amount converted, neglected to pay such amount to himself as guardian for the use of the ward, there was a breach of the second bond as well as of the first.

³²⁹ *Madison Co. vs. Johnston*, 51 Iowa 152; 50 N. W. 492; *Bunce vs. Bunce*, 65 Iowa 106; 21 N. W. 205; *Morris vs. Cooper*, 35 Kan. 156; 10 Pac. 588; *Judge of Probate vs. Toothaker*, 83 Me. 195; 22 Atl. 119; *State vs. Harbridge*, 43 Mo. App. 16; *Commonwealth vs. Pray*, 125 Pa. 542; 17 Atl. 450; *Commonwealth vs. Amer. Bonding & Tr. Co.*, 16 Pa. Super. Ct. 570; *Kester vs. Hill*, 42 W. Va. 611; 26 S. E. 376; *Smith vs. Gummere*, 39 N. J. Eq. 27.

Contra—*Southern Surety vs. Burney*, 126 Pac. 748; 34 Okl. 552.

In Ohio, where the Statute (Sec. 6269) provides that the guardian shall be required "at the expiration of his trust, fully to account for and pay over to the proper person all of the estate of his ward remaining in his hands," it was considered that this language was sufficiently comprehensive to include a liability on the general bond for all assets of the estate, whether derived from personalty or from sale of land, in a case where the condition of the general bond was to "faithfully discharge all of his duties as such guardian as is required by law." *Tuttle vs. Northrop*, 44 O. S. 178; 5 N. W. 659.

In *Rudy vs. Rudy*, 145 Ky. 245; 140 S. W. 192, a guardian sold the land of his ward and converted the proceeds. In an action on the bond of the guardian, the sureties were held not liable, it appearing that because the guardian had failed to

Debts due the ward by the guardian become assets in the hands of the guardian, and in contemplation of the law the officer will be considered as having paid the debt to himself as trustee as soon as it matures, and his sureties are liable for its proper application, the same as for money actually received.³³⁰ Money paid the guardian after the ward maintains his majority, although paid in for the account of the ward, does not, in case of conversion, become a charge against the sureties.³³¹

§225. Settlement of guardian's account — Release of sureties on the bond.

The duty of the guardian is not ended when the ward attains majority, and the sureties continue liable for the proper settlement and adjustment of the affairs of the ward even though the business transactions extend beyond the time of the minority.

The delay of the ward after arriving of age in compelling settlement will not relieve the sureties for defaults committed after the term of minority, since the sureties have the same right as the ward to compel a speedy accounting and the resulting loss is as much the consequence of their own negligence as that of the ward.³³²

It is, however, the duty of the guardian to make settlement and pay over the money in his hands to the ward as soon as he attains his majority, and a failure to do so is of itself a breach of the bond for which action can at once be brought.³³³

The bond must stand as security for a full and fair settlement by the guardian, a release by the ward, and the execution of a receipt reciting that the whole amount of the estate had been paid over when it had not in fact been paid, will not constitute a defense to the sureties, such settlement will be presumed to be

comply with the statutory formalities required for such sale, the sale was void. The court held that, since the sale was void, the moneys received were not paid to the principal in his capacity as guardian but as an individual, and since the bond covered only his default as guardian, the sureties would not be liable for his defaults in any other capacity.

See also *Swisher vs. McWhinney*, 64 O. S. 343; 61 N. E. 1149.

³³⁰ *Sargent vs. Wallis*, 67 Tex. 483; 3 S. W. 721; *Mattoon vs. Cow-*

ing, 79 Mass. 387. This rule in some jurisdictions is limited to cases in which the guardian is solvent at the time of his appointment. *Black vs. Kaiser*, 91 Ky. 422; 16 S. W. 89; *Johnson vs. Hicks' Guardian*, 97 Ky. 116; 30 S. W. 3; *U. S. F. & G. Co. vs. State*, 81 N. E. 226; 40 Ind. App. 136.

³³¹ *Shelton vs. Smith*, 62 Tenn. 82.

³³² *Newton vs. Hammond*, 38 O. S. 430.

³³³ *People vs. Brooks*, 22 Ill. App. 594.

fraudulent.³³⁴ Also where the ward by misrepresentation is induced to accept worthless securities in settlement, he may thereafter repudiate the transaction and recover from the sureties.³³⁵

The ward must, however, elect to rescind the transaction within a reasonable time.³³⁶

It is held that the acceptance by the ward of the note of the guardian in settlement of his accounts, is a full defense to the sureties.³³⁷

Where the guardian became trustee for the ward, and upon final accounting passed receipt to himself as guardian executed in his trust capacity, it was held that the sureties upon the guardian bond were liable for the amount received for.³³⁸

§226. An adjudication against the guardian is conclusive against the sureties.

An approval of the final account of a guardian and an order for the payment of the balance found due, is conclusive against the sureties, although not a party to the accounting, and although they had no actual notice of the filing of the account.³³⁹

³³⁴ *Carter vs. Tice*, 120 Ill. 277; 11 N. E. 529; *Gillett vs. Wiley*, 126 Ill. 310; 19 N. E. 287; *People vs. Borders*, 31 Ill. App. 426; *Parr vs. State*, 71 Md. 220; 17 Atl. 1020.

³³⁵ *Douglass vs. Ferris*, 138 N. Y. 192; 33 N. E. 1041; *National Surety Co. vs. Heimann*, 103 N. E. 105.

³³⁶ *Hardin's Admr. vs. Taylor*, 78 Ky. 593.

³³⁷ *Price vs. Barnes*, 7 Ind. App. 1; 34 N. E. 408.

³³⁸ *State vs. Branch*, 134 Mo. 592; 36 S. W. 226. In this case the guardian was solvent at the time of his settlement, and the funds of the ward were invested in his private business, there was no actual withdrawal of the amount from the business; the conversion was the result of a subsequent business failure by the guardian.

The investment by the guardian of the amount due on final settlement, for the joint account of the

guardian and ward, and by agreement with the ward, there being no fraud in the transaction, will release the sureties, even though the amount was never actually paid to the ward. *People vs. Seelye*, 146 Ill. 189; 32 N. E. 458.

³³⁹ *Ream vs. Lynch*, 7 Ill. App. 161; *Kattleman vs. Guthrie's Estate*, 142 Ill. 357; 31 N. E. 589; *State vs. Slauter*, 80 Ind. 597; *Knepper vs. Glenn*, 73 Iowa 730; 36 N. W. 763; *Braiden vs. Mercer*, 44 O. S. 339; 7 N. E. 155; *Commonwealth vs. Julius*, 173 Pa. 322; 34 Atl. 21; *Shepard vs. Pebbles*, 38 Wis. 373; *Southern Surety Co. vs. Burney*, 126 Pac. 748; 34 Okl. 552; *Beakley vs. Cunningham*, 165 S. W. 259; *Title Guaranty & Surety Co. vs. Slinker*, 128 Pac. 696; 35 Okl. 128.

It has sometimes been considered that such adjudication against the guardian is only prima facie evidence against the sureties, where the

Where the settlement is procured by fraud, and an entry made approving securities turned in as part of the settlement, and the guardian discharged, such judgment is not conclusive on the ward, and an action may be maintained on the bond to recover for the amount of worthless securities in which the guardian invested the funds of the estate.³⁴⁰

§227. Bonds given in the course of insolvency proceedings.

Receivers, trustees or assignees in insolvency are officers of the court, charged with the duty of receiving and preserving the property of the insolvent, pending a determination by the court of the rights of the creditors. This class of trustees are executive in their functions, they have been termed the "hand of the court."³⁴¹

They represent neither the claimants nor the insolvent, but occupy a neutral middle ground subject only to the orders of the court; the property in their possession is *in custodia legis* and generally their possession cannot be disturbed without the express consent of the court.

These officers are required to execute bond, to cover not only their fidelity in properly accounting for money and property coming into their hands, but also conditional that they will be responsible in damages if they fail to obey the orders of the court in all matters touching the administration of their trust.

A failure to perform the order of the court in respect to the disbursements of the trust fund is a breach of the bond, and action may be brought by the creditors entitled to distribution.³⁴²

settlement of account is made without notice to the sureties. *State vs. Hoster*, 61 Mo. 544; *State vs. Ross-waag*, 3 Mo. App. 11.

³⁴⁰ *State vs. Peckham*, 136 Ind. 198; 36 N. E. 28. In this case the guardian loaned the money of the ward to an insolvent partnership, and in his settlement represented to the court that the firm was solvent, and thus secured an approval of his accounts.

³⁴¹ *Ellicott vs. Warford*, 4 Md. 85. *Eccleston, J.*: "The appointment of a receiver does not determine any right, or affect the title of either party, in any manner whatever. He is the officer of the court; and truly the hand of the court."

³⁴² *Van Slyke vs. Bush*, 123 N. Y. 47; 25 N. E. 196; *Garver vs. Tisenger*, 46 O. S. 56; 18 N. E. 491.

or by the successor in office where the officer has been removed.³⁴³

An order of the court fixing the amount due from a receiver or assignee is conclusive upon the sureties.³⁴⁴

It is held that where a creditor attacks an assignment for fraud and secures a vacation of the trust, that he cannot thereafter recover from the sureties upon the bond for a failure of the assignee to account for the fund, since the assignment as to such creditor was a nullity, and he might have levied upon the property of the assignor.³⁴⁵

§228. Bail bonds.

Bail is the delivery or bailment of a person to his sureties, and is brought about by the execution of a bond in the manner and form provided by statute, conditioned to redeliver the defendant to the custody of the law at a time and place appointed in the bond.

Bail cannot be given except by permission of the court, and on terms prescribed by the court. The granting of bail is a judicial act and unless an order is made admitting the defendant to bail, the transaction is voluntary, and the undertaking a nullity.³⁴⁶

The authority and jurisdiction to admit to bail is conferred by law and the bond will be void, and impose no liability on the

³⁴³ Phillips vs. Ross, 36 O. S. 458.

³⁴⁴ Walsh vs. Miller, 51 O. S. 462;
38 N. E. 381.

But see *People vs. White*, 28 Hun 289.

³⁴⁵ *People vs. Chalmers*, 60 N. Y. 154. "The statute was intended to protect the interests of creditors under valid assignments made for their benefit, and creates the requisite machinery for accomplishing that object; but it was not intended to secure the payment of assets upon judgments obtained in hostility to the assignment. The judgments obtained in behalf of the creditors

prosecuting the bond declared the assignment void for fraud. As to them the assignment was a nullity, and the judgments obtained by them are conclusive. It follows that they were not, and could not be, prejudiced by the assignment. It never for an instant placed the property beyond the reach of legal process. They might have levied upon it by execution, and the process of injunction, and the appointment of a receiver were open to them."

³⁴⁶ *State vs. Gilbert*, 10 La. Ann. 532; *Morgan vs. Commonwealth*, 12 Bush (Ky.) 84.

sureties, if the bailment is ordered by an officer having no power to act in the premises.³⁴⁷

Parties to a recognizance or bail bond are estopped by the execution of it to deny the truth of the recitals it contains.^{347a}

If the bond recites all the necessary jurisdictional facts the sureties will be estopped from asserting a lack of authority in the officer to take bail,³⁴⁸ neither can the sureties question the regularity of the proceedings antecedent to taking bail, such as whether the requisite preliminary affidavit or information was filed.³⁴⁹

§229. Conditions in bail bonds—Time of appearance.

An important and distinguishing feature of bail is the time fixed in the undertaking for the appearance of the defendant. In general the recognizance must stipulate a fixed time of appearance. There can be no forfeiture of bail unless the obligation is definite. It was held that a requirement to appear on the "—— day of April next" is void for uncertainty.³⁵⁰

A stipulation to appear at the next term of court, the time on the coming in of the court being fixed by law, is sufficiently definite,³⁵¹ even though the wrong date is specified in the bond.³⁵²

³⁴⁷ United States vs. Hudson, 65 Fed. Rep. 68; State vs. Caldwell, 124 Mo. 509; 28 S. W. 4; Dugan vs. Commonwealth, 69 Ky. 305; Pace vs. Mississippi, 25 Miss. 54; Blevins vs. State, 31 Ark. 53; Rupert vs. People, 20 Colo. 424; 38 Pac. 702.

But see Jones vs. Gordon, 82 Ga. 570; 9 S. E. 782.

^{347a} Husbands vs. Commonwealth, 143 Ky. 290; 136 S. W. 632.

³⁴⁸ Harris vs. State, 60 Ark. 212; 29 S. W. 751.

³⁴⁹ State vs. Nicol, 30 La. Ann. 628; State vs. Hendricks, 40 La. Ann. 719; 5 South. 24; United States vs. Wallace, 46 Fed. Rep. 569; Peck vs. State, 63 Ala. 201; Junction City vs. Keefe, 40 Kas. 275; 19 Pac. 735.

Contra—Seal vs. State, 102 S. W. 414; 51 Tex. Civ. App. 425.

In Dilley vs. State, 3 Idaho 285; 29 Pac. 43, it was held that the sureties upon a bail bond cannot question the jurisdiction of the magistrate who took the bond.

See also People vs. Meacham, 74 Ill. 292.

³⁵⁰ Coleman vs. State, 10 Md. 168.

See also United States vs. Keiver, 56 Fed. Rep. 422. Where the condition was to appear at a special term of the United States District Court thereafter to be called.

But see State vs. Ansley, 13 La. Ann. 298. Where the appearance was to be "when notified," this was considered sufficiently definite.

In Kellogg vs. State, 43 Miss. 57, the term of the Court and the day of the week and month was stipulated, but the year was omitted,—held, that the next term of court was sufficiently indicated, and that the sureties were liable.

³⁵¹ O'Neal vs. State, 35 Tex. 130.

³⁵² Brite vs. State, 24 Tex. 219; Territory of Oklahoma vs. Conner, 17 Okl. 135; 87 Pac. 591; Proseck vs. State, 38 O. S. 606.

See also People vs. Welch, 47 How. Pr. 420. Where the condition

Where the bond recites a date when no court is held, and there is nothing in the undertaking or the record from which it can be inferred that the next term of court was intended, the instrument is void.³⁵³

If the defendant appears at the "next term" as set out in the bond, and the cause is continued, the bond will remain in force from term to term, unless renewal bond is substituted, and the sureties will be held for the defendant's non-appearance at a subsequent term.³⁵⁴ This construction will not, however, apply except to continuances in regular succession in the course of the business of the court, a stipulation between the defendant and the prosecution postponing the trial to some future term of court, the sureties not consenting, will discharge the bail. This was so held where an entry was made on the minutes of the court postponing the trial until the determination of cases pending in another court.³⁵⁵ But the liability of the sureties is not affected by

was the next term of court, but, by clerical error, a date was named which was already past.

To the same effect see *State vs. Lay*, 128 Mo. 609; 29 S. W. 999; *Allen vs. Commonwealth*, 90 Va. 356; 18 S. E. 437.

But see *Wegner vs. State*, 28 Tex. App. 419; 13 S. W. 608. Where the impossible date "A. D. 188—" was named as the time of appearance and the bond was held to be defective.

³⁵³ *Burnett vs. State*, 18 Tex. App. 283; *Treasurer of Vermont vs. Merrill*, 14 Vt. 64.

³⁵⁴ *Stokes vs. People*, 63 Ill. 489; *State vs. Smith*, 66 N. C. 620; *Pickett vs. State*, 16 Tex. App. 648; *People vs. Hanan*, 106 Mich. 421; 64 N. W. 328; *Ramey vs. Commonwealth*, 83 Ky. 534; *Rubush vs. State*, 112 Ind. 107; 13 N. E. 877; *State vs. Benzion*, 79 Iowa 467; 44 N. W. 709; *State vs. Breen*, 6 S. D. 537; 62 N. W. 135; *St. Louis vs. Renning*, 235 Mo. 44; 135 S. W. 5; *State vs. Holt*, 145 N. C. 450; 59 S. E. 64.

Contra—*Colquitt vs. Smith*, 65 Ga. 341.

³⁵⁵ *Reese vs. United States*, 9 Wall. 13, *Field, J.*: "If, now, we apply the ordinary and settled doctrine, which controls the liabilities of sureties, it must follow that the sureties on the recognizance in the suit are discharged. The stipulation, made without their consent or knowledge, between the principal and the government, has changed the character of his obligation; it has released him from the obligation which they covenanted that he should comply, and substituted another in its place. It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their

an order of court changing the date of the term, as the sureties will be deemed to have had in contemplation the possible exercise of this power by the court.³⁵⁶

§230. Same subject — Place of appearance.

There can be no forfeiture of a bail bond unless a place of appearance is definitely specified in the undertaking.³⁵⁷ A condition expressed in the alternative is held to be void for uncertainty as where a magistrate takes a recognizance conditioned for an appearance before him or some other magistrate.³⁵⁸ So also a bail to appear before a court which has no existence.³⁵⁹

In a case where the judge, without statutory authority, and of his own motion, ordered a change of venue, it was held that the failure of the accused to appear in the court to which the case was transferred was not a forfeiture of the bail,³⁶⁰ although

liability to the precise terms of their contract, and the effect upon such liability of any change of the terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

³⁵⁶ *State vs. Aubrey*, 43 La. Ann. 188; 8 South. 440.

³⁵⁷ *Barnes vs. State*, 36 Tex. 332; *Pill vs. State*, 43 Neb. 23; 61 N. W. 96; *Hutchinson vs. State*, 43 Tenn. 95.

In *Thomas vs. State*, 127 S. W. 1030, held: "A bail bond given for appearance of accused before the district court of a county is insufficient, the county having two district courts, and the particular one not being designated, though the time and place is stated."

³⁵⁸ *State vs. Allen*, 33 Ala. 422.

³⁵⁹ *Coleman vs. State*, 10 Md. 168. In this case the recognizance was to appear before the "County Court," and the Bail was held to be void, there being no such court, the court by this name having been previously abolished and a "Circuit" Court established in its place.

But see *Petty vs. People*, 118 Ill. 148; 8 N. E. 304. The condition of the recognizance was that the accused should appear before the "Criminal Court," and there was no such court, but the Circuit Court was vested with exclusive criminal jurisdiction. This was held to be sufficiently definite.

³⁶⁰ *Adams vs. People*, 12 Ill. App. 380; *State vs. Young*, 20 La. Ann. 397.

a transfer of the case in accordance with authority conferred by law binds the sureties for the appearance of the accused in the court to which the case is transferred.³⁶¹ Also where by act of Legislature all pending criminal cases are transferred to another court, the parties to an undertaking in bail are bound for the appearance of the defendant in the substituted court.³⁶²

It was held that where a prosecution was removed from the State Courts to the Federal Courts in accordance with the provisions of law, that the bail was incident to the prosecution, and followed the case into the Federal Court, and would not be forfeited by a failure to appear in the State Court as recited in the bond.³⁶³

§231. Defenses against bail bonds.

The sureties can not defend against a recognizance, where the defendant fails to appear, on the ground that the indictment or information is defective,³⁶⁴ or that the defendant was illegally taken into custody,³⁶⁵ or that the bail was executed before the accused was arrested, or that the statute under which the accused was indicted was unconstitutional,^{365a} as his appearance for the purpose of executing the recognizance places him in legal custody and waives the irregularity.³⁶⁶ Where conditions are imposed not required by law, the bond will not be void, but the unauthorized conditions will be considered as surplusage and the bond held effective as to the other terms.³⁶⁷

³⁶¹ Pearson vs. Brown, 7 Tex. App. 279; Beasley vs. State, 53 Ark. 67; 13 S. W. 733; State vs. Brown, 16 Iowa 314.

³⁶² Ramey vs. Comm., 83 Ky. 534.

³⁶³ Davis vs. South Carolina, 107 U. S. 597; 2 S. Ct. 636.

³⁶⁴ United States vs. Evans, 2 Fed. Rep. 147; Hardy vs. United States, 71 Fed. Rep. 158; State vs. Livingston, 117 Mo. 627; 23 S. W. 766; State vs. Morgan, 124 Mo. 467; 28 S. W. 17; Hester vs. State, 15 Tex. App. 418; Lee vs. State, 25 Tex. App. 331; 8 S. W. 277; Friedline vs. State, 93 Ind. 366; Harris vs. State, 60 Ark. 209; 29 S. W. 640; Sharpe vs. Smith, 59 Ga. 707; State vs. Poston, 63 Mo. 521; State vs. Sureties of Krohne, 4 Wyo. 347; 34 Pac. 3.

Contra—Mason vs. Terrell, 3 Ga. App. 348; 60 S. E. 4.

³⁶⁵ Littleton vs. State, 46 Ark. 413.

^{365a} U. S. vs. Du Faur, 187 Fed. 812; 109 C. C. A. 572; People vs. Rubright, 160 Ill. App. 528.

³⁶⁶ Vias vs. Comm., 7 Ky. L. Rep. 742.

But see Deer Lodge Co. vs. At., 3 Mont. 168, where recognizance taken before any written complaint was filed was declared void.

See also Hodges vs. State, 20 Tex. 493.

³⁶⁷ State vs. Adams, 40 Tenn. 259; State vs. Crowley, 60 Me. 103; State vs. Cobb, 71 Me. 198.

But see Durein vs. State, 38 Kan. 485; 17 Pac. 49; Turner vs. State, 14 Tex. App. 168.

If the bond fails to specify any offense for which the bail is given, the undertaking is void,³⁶⁸ but it will be sufficient if the bond specifies the offense in general terms.³⁶⁹

Where the bond describes one offense, and the indictment is for another and different offense, the variance will invalidate the bail,³⁷⁰ but if the variance is merely one of degree, such as a recognizance for robbery and an indictment for petit larceny, the bond is not invalidated.³⁷¹

A bail bond conditioned to answer for an act which is not an offense against the law is not binding on the sureties. It was held that a recognizance to appear and answer for "a charge of gaming,"³⁷² or for "being concerned in a row,"³⁷³ or "unlawfully selling mortgaged property,"³⁷⁴ is not binding since no indictable offense is charged.

It is no defense to an action upon a bail bond that there was no indictment rendered against the accused. The sureties un-

³⁶⁸ Horton vs. State, 30 Tex. 191; Littlefield vs. State, 1 Tex. App. 722; Waters vs. People, 4 Col. App. 97; 35 Pac. 56; State vs. Wooten, 4 La. Ann. 515; Simpson vs. Comm., 31 Ky. 523.

Contra—People vs. Gillman, 125 N. Y. 372; 26 N. E. 469. "Being the voluntary act of the party, the undertaking permits the presumption of regularity of the proceedings, and by coming into the proceeding in that manner, in behalf of the accused, the surety will be presumed to know upon what charge the prisoner was held by the sheriff. The statement of the offense charged, therefore, is not of the essence of the undertaking of bail, nor does it bear materially upon the obligation."

³⁶⁹ State vs. Merrihew, 47 Iowa 112; People vs. Dennis, 4 Mich. 609; Territory of Oklahoma vs. Conner, 17 Okl. 135; 87 Pac. 591; State vs. O'Keefe, 108 Pac. 2; 32 Nev. 331; Marmaduke vs. People, 101 Pac. 337; 45 Col. 357; Territory vs. Minter, 88 Pac. 1130.

³⁷⁰ Reese vs. People, 11 Ill. App. 346; State vs. Forno, 14 La. Ann. 450; Draughan vs. State, 35 Tex. Cr. Rep. 51; 35 S. W. 667.

Gray vs. State, 43 Ala. 4. In this case the recognizance was to answer the charge of perjury, and the indictment was for burglary.

Addison vs. State, 14 Tex. Crim. App. 568, where the recognizance was for theft and the indictment for swindling.

Contra—People vs. Metcham, 74 Ill. 292.

³⁷¹ Mudd vs. Comm., 14 Ky. L. Rep. 672.

See also Comm. vs. Teevens, 143 Mass. 210; 9 N. E. 524; State vs. Bryant, 55 Iowa 451; 8 N. W. 303; Murray vs. People, 111 Pac. 711; 49 Colo. 109.

³⁷² Tousey vs. State, 8 Tex. 173.
³⁷³ State vs. Ridgley, 10 La. Ann. 302.

³⁷⁴ Cravey vs. State, 26 Tex. App. 84; 9 S. W. 62.

See also Woods vs. State, 103 S. W. 895; 51 Tex. Cr. App. 595; Martin vs. State, 145 S. W. 916.

dertake for the appearance of their principal at the time and place set out in the bond, and the bond is forfeited if he does not appear. The failure to indict does not of itself discharge the accused. His discharge still rests in the discretion of the court.³⁷⁵

The obligation of the surety is that the accused will appear at the time named in the bond, and it will be no defense that after the bond was declared forfeited the accused appeared to answer the charge.³⁷⁶

It was held that a subsequent appearance and trial will release the sureties from the technical forfeiture.³⁷⁷

It is no defense that the prosecuting attorney consented to the departure of the accused from the state and promised to dismiss the case at the next term, as such agreement is beyond his authority and will not be binding on his successor in office.^{377a}

§232. Discharge or exoneration of bail.

A surrender of the accused to the proper public officer discharges the bail at once from all liability. Such surrender may be made at any time before the case is called for trial.³⁷⁸

The principal, in the contemplation of the law, is continually in the custody of his sureties and they may at any time cause his

³⁷⁵ *Champlain vs. People*, 2 N. Y. 82. "After the discharge of the grand jury, prisoners charged with offenses and not indicted are not entitled to be set at liberty, if satisfactory cause be shown for detaining them in custody, until the meeting of the next grand jury. Under like circumstances, persons out on bail are continued under recognizance when not discharged.

"It is necessary, for the most obvious reasons, that this power of detention should exist and be occasionally exercised. Offenders would otherwise frequently escape punishment, by the sickness or unavoidable absence of a material witness, while the grand jury was sitting, and by various other accidental causes."

See also *State vs. Kyle*, 99 Ala. 256; 13 South. 538; *McCoy vs. State*, 37 Texas. 219; *State vs. Millsaps*, 69 Mo. 359; *Mooney vs. People*, 81 Ill. 134; *Hinkson vs. Comm.*, 14 Ky. L. Rep. 203.

³⁷⁶ *Hangaleben vs. People*, 89 Ill.

164; *State vs. Scott*, 20 Iowa 63; *State vs. Emily*, 24 Iowa 24; *State vs. McGuire*, 16 R. I. 519; 17 Atl. 918; *Lee vs. State*, 25 Tex. App. 331; 8 S. W. 277; *Sproat vs. Comm.*, 4 Ky. L. Rep. 629; *State vs. Drake*, 40 Okl. 538; 139 Pac. 976.

³⁷⁷ *Bearden vs. State*, 89 Ala. 21; 7 South. 755; *State vs. Burnham*, 44 Me. 278; *State vs. Schexneider*, 45 La. Ann. 1445; 14 South. 250; *McArdle vs. McDaniel*, 75 Ga. 270; *State vs. Williford*, 104 Kan. 221, 178 Pac. 612.

Contra—*Sproat vs. Commonwealth*, 4 Ky. L. Rep. 629.

^{377a} *Husbands vs. Commonwealth*, 143 Ky. 290; 136 S. W. 632.

See also *Cameron vs. Burger*, 120 Pac. 10; 60 Or. 458; *Tanquary vs. People*, 25 Col. App. 531; 139 Pac. 1118.

³⁷⁸ *Boswell vs. Colquitt*, 73 Ga. 63; *Kellogg vs. State*, 43 Miss. 57; *State of South Dakota vs. Casey*, (S. D.) 183 N. W. 971, 15 A. L. R. 1521, and note.

arrest and commitment, and for that purpose, command the assistance of the sheriff and his officers.³⁷⁹

It is held that the arrest of the accused at the request of the sureties is of itself equivalent to a surrender and the release of the bond from all further liability.³⁸⁰ But a mere request by a surety to a sheriff to take the accused into custody, if not complied with, will not exonerate the surety, notwithstanding it was the duty of the officer to make the arrest.³⁸¹

If after the principal has been surrendered by the bail, either voluntarily or in pursuance of an order of the court, he is again released and escapes, no liability attaches upon the bond.³⁸²

Where the principal, after the bailment, is again taken into custody, such re-arrest is constructively a surrender of the accused and exonerates the sureties.³⁸³ But it is held that the mere fact that the principal is taken into custody upon another charge and upon a warrant issuing out of the same court will not release the bail.³⁸⁴

The death of the principal releases the sureties from the obli-

³⁷⁹ *State vs. Cunningham*, 10 La. Ann. 393; *State vs. Lingerfelt*, 109 N. C. 775; 14 S. E. 75; *Carr vs. Sutton*, 70 W. Va. 417; 74 S. E. 239.

Taylor vs. Taintor, 16 Wall. 371. "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is

needed. It is likened to the re-arrest by the sheriff of an escaping prisoner."

³⁸⁰ *Sternberg vs. State*, 42 Ark. 127.

But see *Ramey vs. Comm.*, 83 Ky. 534.

³⁸¹ *People vs. Robb*, 98 Mich. 397; 57 N. W. 257.

³⁸² *People vs. McReynolds*, 102 Cal. 308; 36 Pac. 590.

³⁸³ *Smith vs. Kitchens*, 51 Ga. 158; *State vs. Orsler*, 48 Iowa 343; *Medlin vs. Comm.*, 74 Ky. 605; *Roberts vs. State*, 22 Tex. App. 64; 2 S. W. 622.

³⁸⁴ *McGuire vs. Comm.*, 7 Ky. L. Rep. 287; *Hartley vs. Colquitt*, 72 Ga. 351.

But see *Smith vs. State*, 12 Neb. 309; 11 N. W. 317.

gation of the bail bond,³⁸⁵ even though death occurs after forfeiture.³⁸⁶

The arrest of the principal while out on bail and his confinement in the penitentiary of another State will not exonerate his sureties.³⁸⁷

Where the accused is delivered over to the authorities of another State by the governor honoring a requisition from such State, it is considered that the sureties are exonerated since the failure to appear is by act of the law of the State where the obligation was assumed.³⁸⁸ It was also held that the arrest of the principal by the Federal authorities upon the same charge and his subsequent imprisonment in another State released the sure-

³⁸⁵ *Pynes vs. State*, 45 Ala. 52; *People vs. Meyer*, 29 N. Y. Supp. 1148; *Conner vs. State*, 30 Tex. 94.

³⁸⁶ *State vs. McNeal*, 18 N. J. L. 33; *State vs. Cone*, 32 Ga. 663; *Mather vs. People*, 12 Ill. 9; *Woolfolk vs. State*, 10 Ind. 532.

³⁸⁷ *Taylor vs. Taintor*, 16 Wall. 366. The principal was admitted to bail in Connecticut and went into the state of New York where he was arrested and taken by requisition proceedings to the state of Maine and there sentenced to a long term in the penitentiary. In an action on the bond it was held—*Swayne, J.*: "It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law. Where the principal dies before the day of performance, the case is within the first category. Where the court before which the principal is bound to appear is abolished without qualification, the case is within the second. If the principal is arrested in the State where the obligation is given and sent out of the State by the governor, upon the requisition of the governor of another State, it is within the third. . . . It is equally well settled that if the impossibility be created by the obligor or a stranger, the rights of the obligee will be in nowise affected. . . . The law which renders the performance impossible, and therefore excuses failure, must be a law opera-

tive in the State where the obligation was assumed, and obligatory in its effect upon her authorities. If, after the instrument is executed, the principal is imprisoned in another State for the violation of a criminal law of that State, it will not avail to protect him or his sureties. Such is now the settled rule."

See also *Ingram vs. State*, 27 Ala. 17; *Cain vs. State*, 55 Ala. 170; *State vs. Horn*, 70 Mo. 466; *Yarbrough vs. Comm.*, 89 Ky. 151; 12 S. W. 153; *King vs. State*, 18 Neb. 375; 25 N. W. 519; *U. S. vs. Martin*, 170 Fed. 476.

A statute provided as one of the defenses against forfeiture of a bail bond, as follows: "The sickness of the principal or some uncontrollable circumstance which prevented his appearance at court, and it must in every such case be shown that his failure to appear arose from no fault on his part." It was held that the fact that the principal was at the time in custody on a similar charge in another county was a legal defense to a forfeiture of his bail bond. *Wood vs. State*, 103 S. W. 895; 51 Tex. Civ. App. 595; *State vs. Funk*, 127 N. W. 722; 20 N. D. 145; *State vs. Row*, 89 Iowa 581; 57 N. W. 306; *People vs. Robb*, 98 Mich. 397; 57 N. W. 257. See also *Moore vs. State*, 106 S. W. 358.

³⁸⁸ *People vs. Moore*, 4 N. Y. Cr. Rep. 205; *State vs. Allen*, 21 Tenn. 258.

ties.³⁸⁹ The sureties will be exonerated by the fact that the principal has been adjudged a lunatic and confined in an asylum.³⁹⁰

Where the accused voluntarily places himself under military jurisdiction by enlisting in the army and thereby is placed beyond the reach of the process of the civil authorities, the sureties upon his bond will nevertheless be liable for his non-appearance.³⁹¹

The condition of the bail "to appear and abide by order of the court" is not satisfied by the fact that the defendant appears at the trial and defends against the charge, if after conviction he escapes, the bond will be forfeited.³⁹²

Where accused appears and pleads guilty and sentence is pronounced, he ceases to be in the custody of the bail and the sureties are discharged by operation of law.^{392a}

Nor can they be again bound by the subsequent vacation of the judgment and the granting of a new trial.^{392b}

³⁸⁹ Comm. vs. Overby, 80 Ky. 208.

³⁹⁰ Comm. vs. Flemming, 15 Ky. L. Rep. 491; Fuller vs. Davis, 1 Gray 612; Wood vs. Comm., 33 S. W. (Ky.) 729.

If the principal, although insane, has not been so adjudged, the sureties will be liable. Commonwealth vs. Allen, 157 Ky. 6; 162 S. W. 116.

Contra—Adler vs. State, 35 Ark. 517; Smith vs. People, 67 Colo. 452, 184 Pac. 372.

³⁹¹ State vs. Scott, 20 Iowa 63; Gingrich vs. People, 34 Ill. 448; Huggins vs. People, 39 Ill. 241.

Contra—Comm. vs. Terry, 53 Ky. 383.

³⁹² Neininger vs. State, 50 O. S. 394; 34 N. E. 633; Glasgow vs. State, 41 Kan. 533; 21 Pac. 253.

But see State vs. Murmann, 124 Mo. 502; 28 S. W. 2.

^{392a} Ford vs. State, 140 S. W. 734; 100 Ark. 515.

^{392b} Miller vs. State, 48 So. 360; 158 Ala. 73.

The recovery upon a bail bond is limited by the penalty. People vs. Parisi, 217 N. Y. 24; 111 N. E. 253; U. S. vs. Broadhead, 127 U. S. 212; People vs. Hanaw, 106 Mich. 421, 64 N. W. 328.

CHAPTER VIII.

CORPORATE SURETYSHIP.

- Sec. 233. Surety Companies—Compensated Suretyship.
- Sec. 234. Private and Corporate Suretyship Compared.
- Sec. 235. Corporate Suretyship and Insurance Compared.
- Sec. 236. Corporate Suretyship as Affected by the Premium or Compensation Paid.
- Sec. 237. Corporate Compensated Suretyship is Within the Statutes of Frauds.
- Sec. 238. Construction of Corporate Suretyship Contracts.
- Sec. 239. Surety Company Bonds as Affected by the Special Stipulations Inserted for Their Protection in the Contract.
- Sec. 240. Same Subject—Stipulation that the Obligee Shall Notify the Surety of any Act of the Principal that "May" Involve Loss Upon the Bond.
- Sec. 241. Stipulations Discharging Surety if Claim is not Made Within a Designated Time.
- Sec. 242. Stipulation that the Amount Paid by Surety Upon the Bond Shall be Conclusive Against the Principal in an Action by the Surety Against the Principal for Indemnity.
- Sec. 243. Contract of the Compensated Surety Valid Only as a Collateral Undertaking.
- Sec. 243a. Joint Control of Trust Funds.

§233. Surety companies—Compensated suretyship.

Corporate Suretyship as a business enterprise has been developed in recent times, but the principles of law defining the rights of the parties to a suretyship contract must of necessity be the same, whether the surety is a private person or an incorporated company, except so far as the liabilities of the latter are controlled and limited by the doctrine of *ultra vires*.

It would seem to be a self-evident proposition that the contractual relation is unaffected by the fact that the surety is incorporated and engaged in suretyship as a business and receives compensation for the undertaking.^a

^aBarton vs. Title Guaranty & Surety Co., 192 Mo. App. 561, 183 S. W. 694, cited also in note, 12 A. L. R. 389 (1921); Lonergan vs. S. A. Trust Co., 101 Tex. 63, 104 S. W. 1061, 106 S. W. 876, 22 L. R. A. (N. S.) 364, 130 Ann. St. Rep. 803.

The difference in the attitude of the private accommodation surety toward the principal and the attitude of the corporate compensated surety is manifest. The one is not in the business of suretyship and makes the contract as a favor and for the accommodation of the principal. The other makes suretyship a business and for profit and usually dictates the terms of the undertaking.

If the courts construe the one liberally and the other strictly, it is not because of any intent to eliminate any contract liability from the one, or to add anything to the obligations of the other.

If the accommodation and compensated surety make exactly the same kind of contract, no court has yet gone so far as to construe the contracts differently, merely because one was corporate and compensated. Surety companies have been classified with insurance companies for purposes of legislative control, because of the similarity of their business methods, but these statutes merely regulate the conduct of the business and do not relate to the suretyship questions involved.¹

¹ The business of insurance has long been under legislative control. Corporate suretyship was not, however, anticipated, and so not provided for in terms in the legislative acts regulating insurance. The similarity in the methods of doing business, especially the fact, that, like insurance, the business is directed from a central or "home office" and distributed through the country by branch offices or agencies, and that its business is secured by solicitors and executed by a form of underwriting similar to insurance, gave rise to the same apparent necessity for legislative regulation which exists in the case of insurance, or in the case of any other financial institution such as a bank or building association, which deals with the public in a way to warrant some

regulation in the interests of the people. In some instances the courts have held that the existing insurance regulations, without any special reference to surety companies being made in the Statute, were broad enough to cover the foreign corporation seeking to do a suretyship business within the State.

Such was the holding in Illinois where it was held that a surety company could not be incorporated under a general act in which "insurance" companies were specially excluded. *People vs. Rose*, 174 Ill. 310; 51 N. E. 246.

The necessity, however, for regulation, and the authority to impose the regulation under the insurance law, has nothing to do with the contractual relations between the surety and the other parties to the con-

The similarity in business methods between insurance companies and surety companies has often been noted in the opinions of judges, but there is no difference in legal effect between contracts of insurance companies and any other corporation,

tract, but is based upon the similarity in the methods of doing business between insurance and Corporate Suretyship, and the fact that there is the same need of public inspection and control in order to protect the individuals who do business with the corporation.

Similar comments might properly be made as to a large number of other cases which purport to construe insurance Statutes and apply their restrictions and regulations to surety companies. They do not decide the suretyship questions involved as to the nature of the contract relation.

See also *People vs. Fidelity & Casualty Co.*, 153 Ill. 25; 38 N. E. 752; *People ex rel. Kasson vs. Rose*, 174 Ill. 310; 51 N. E. 246; *United States Fidelity & Guaranty Co. vs. First National Bank*, 233 Ill. 475; 84 N. E. 670; *American Surety Co. vs. Folk*, 124 Tenn. 139; 135 S. W. 778; *People vs. Potts*, 264 Ill. 522, 106 N. E. 524.

In *American Surety Co. vs. Shallenberger*, 83 Fed. 636, it was held that State regulation could not be carried to the extent of fixing premium rates.

"In recent years the most interesting questions in the law of suretyship have arisen through the advent of the incorporated surety company. The older law assumed that, as between principal and surety, the obligation was gratuitous, the motive friendship or expectation of reciprocal advantage. While the common law could not unmake the surety's contract, it could take account of his disinterestedness by permitting him to stand on the very letter of his agreement; the undertaking of the surety, to use the favorite phrase,

being regarded as *strictissimi juris*. The protection, given to the surety under this rule before equity had ameliorated his lot, was very similar to that given to the prisoner through the technical interpretation of indictments before the reform of the criminal law and is unnecessary in the present state of the law; a guaranty, like other contracts, should receive a reasonable construction with a view to ascertaining and carrying into effect the true intention of the parties. The trend of American decisions is to distinguish between individual and corporate suretyship and to deny favors to the latter because the transaction is essentially insurance, undertaken by companies organized to conduct such a business for profit upon terms usually prescribed by themselves." *Guaranty Co. vs. Pressed Brick Co.*, 191 U. S. 416; *Young vs. American Bonding Co.*, 228 Pa. 373; *Boppert vs. Surety Co.*, 140 Mo. App. 675; *Champion I. Co. vs. American Bonding Co.*, 115 Ky. 863; *Leshner vs. Fidelity Co.*, 239 Ill. 502; *Philadelphia vs. Fidelity Co.*, 231 Pa. 208 s. c. Ann. Cas. (1912) 1085, and note; 64 Univ. of Pa. L. Rev. 200; *Cowles vs. U. S. F. & G. Co.*, 32 Wash. 120, 98 Ann. S. Rep. 838, 72 Pac. 1032; *U. S. F. & G. Co. vs. First National Bank*, 233 Ill. 475, 84 N. E. 670; *Livingston vs. Fidelity & D. Co.*, 76 Ohio S. 253, 81 N. E. 330, 66 U. of Pa. Law Review 40, 65; *Victoria Lumber Co. vs. Wells*, 139 La. 500, 71 So. 781; *Ohio County vs. Clemens*, 85 W. Va. 11, 100 S. E. 680; *Comey vs. United Surety Co.*, 217 N. Y. 268, 111 N. E. 832; *Wasco County vs. N. E. Equitable Ins. Co.*, 88 Oregon 465, 172 Pac. 126.

after the meaning of the contract has been determined and the scope defined.

The business in which a corporation or individual is engaged does not change the fundamental law of contracts as applied to them.

Corporate Suretyship is not a new kind of promise to pay the debt of another. It differs from private suretyship in the fact that it rests upon somewhat better business methods, the rights involved being more clearly defined by the parties themselves, leaving a more limited field in which to apply the equities and presumptions of the established law of suretyship.

There is a broad distinction between the legal principles which control the performance of a contract after its meaning and scope have been determined and the rules of construction which are applied in determining its meaning.

The latter constitutes a preliminary question and is not related in any special way to suretyship.

If a rule of strict construction is applied either because the surety prepared its own contract form, or is engaged in the business of suretyship for profit, or because the bond is like an insurance policy, or because the surety is a quasi public corporation, or for any other reason, the point is finally reached where the Private and Corporate Surety stand upon the same footing, and are thereafter treated exactly alike, and the courts are in full accord as to this view.

Except in Texas, the law everywhere appears well settled that while the contract of an individual surety, or voluntary surety as spoken of in some cases, will be strictly construed and all doubts and technicalities resolved in favor of the surety, this rule does not apply in the case of a company organized for the express purpose of acting as a surety for a compensation.

Indemnity Co. vs. Granite Co., 100 Ohio S. 373, 126 N. E. 405, expresses the general rule: "Unlike an ordinary private surety, a surety of the character here involved, which accepts money consideration, has the power to and does fix the amount of its premium so as to cover its financial responsibility. This class of suretyships therefore is not regarded as 'a favorite of the law.' And if the terms of the surety contract are susceptible of two constructions, that one should be adopted, if con-

sistent with the purpose to be accomplished, which is most favorable to the beneficiary."

See *H. & S. Engineering Co. vs. Turney*, 110 Texas 148, 216 S. W. 621; *Loneragan vs. Trust Co.*, 101 Texas, 63, 22 L. R. A. (N. S.) 364; *Federal Union Surety Co. vs. Maguire*, 111 Ark. 373, 163 S. W. 1171; *U. S. F. & G. Co. vs. Poetker*, 180 Ind. 255, 102 N. E. 372; *American Surety Co. vs. Pangburn*, 182 Ind. 116, 105 N. E. 769; *Hileman vs. Faus*, 178 Iowa 644, 158 N. W. 597; *Hormel vs. American Bonding Co.*, 112 Minn. 288, 33 L. R. A. (N. S.) 513, 128 N. W. 12; *Philadelphia vs. Fidelity & Deposit Co.*, 231 Pa. St. 208, Ann. Cases 1912B, 1085, 80 Atl. 62; *Brown vs. Title Guaranty & Surety Co.*, 232 Pa. St. 337, 38 L. R. A. (N. S.) 698, 81 Atl. 410; *Guaranty Co. vs. Pressed Brick Co.*, 191 U. S. 416; *U. S. F. & G. Co. vs. First National Bank*, 233 Ill. 475, 84 N. E. 670.

To apply a strict construction to a contract against the party writing it is in no sense a new rule.

The frequent references in the reported suretyship cases to the "law of insurance," or the use of the words "corporate suretyship is like insurance" have no meaning, except as they relate merely to the construction of the contract and these rulings have no relation to the proposition sometimes urged, that corporate suretyship is a new and different kind of suretyship.

Some of the earlier cases have been misunderstood on this point, but there is no room for doubting the attitude of the courts at this time.

"We must keep in view the character of contracts of suretyship of corporations organized for the purpose of engaging, for profit, in the business of guaranteeing the fidelity or contracts of a third party, and the rules of construction applicable to their contracts. While such contracts in form resemble those of suretyship, they are in fact contracts of insurance, to which the rules of construction peculiar to contracts of suretyship proper do not apply, but to which the rules governing ordinary insurance contracts are applicable.

"The rule of construction applicable to a contract of insurance, in cases where the Legislature has not prescribed a standard policy, is settled, to the effect that if there is any ambiguity in language or condition, or it is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured, that should be adopted which is most favorable to the insured. The rule of strict construction against the insurer and the liberal one in favor of the insured must prevail under such circumstances.

"If, however, the terms of the contract be clear, and not fairly susceptible of two constructions, an ambiguity cannot be assumed, and the plain intention of the party nullified by construction."^{1a}

^{1a} *Hormel vs. American Bonding Co.*, 112 Minn. 288; 128 N. W. 12; 33 L. R. A. (N.S.) 513, and note; *Livingston vs. Fidelity & Deposit Co.*, 76 Ohio S. 253, 81 N. E. 330. See also *American Surety Co. vs. Pauly*, 170 U. S. 133; *U. S. F. & G.*

Co. vs. Golden Pressed Brick Co., 191 U. S. 416; *City of Topeka vs. Federal Union Surety Co.*, 213 Fed. 958.

The case of *Bank of Tarboro vs. Fidelity & Deposit Co.*, 128 N. C.

The Supreme Court of the United States, in discussing the construction of suretyship contracts, according to the rule of the law of insurance, has expressed itself thus:

"That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument, . . . but this

366; 38 S. E. 908, goes to the extent of comparing Surety Companies with public service corporations and suggests the name of "common surety" for the purpose of classifying Surety Companies with common carriers in their relations to the public, but even this case deals altogether with the construction of ambiguities and does not rule that corporate suretyship differs in any other way from private suretyship.

The Court says: "In its very form and essence the bond before us resembles an insurance contract and differs materially from the ordinary forms coming down to us from immemorial usage. Therefore we must place such bonds in the general class of insurance policies and construe them upon the same general principles; that is, most strongly against the company, and most favorably to their general intent and essential purpose. . . . The defendant has voluntarily become, by virtue of the statute, what may be called a "common surety"; not exactly in the nature of a common carrier, like railroad and telegraph companies, but still, one of those public agencies to which are given unusual powers and which have assumed the most sacred responsibilities. Permitted by law to act as sole sureties for trustees, guardians, administrators and other fiduciaries, they are held by the policy of

law to the full measure of the responsibility they have voluntarily assumed. They may make such reasonable regulations as are necessary for their own protection or the proper transaction of their business; but such stipulations will be most strongly construed against a forfeiture of the indemnity, for which alone the bond is given, and in favor of a fair and equitable construction of the essential purposes of the contract."

To the same effect, see *Bryant vs. American Bonding Co.*, 77 O. S. 90; 82 N. E. 960. "What is the nature of the contract? Is it one simply of suretyship,—one of those known as voluntary contracts, or is it rather one of the class issued for a money consideration and because of a desire for pecuniary gain? If the former, then it is one wherein the surety is regarded as a favorite of the law and all doubtful questions to be resolved in his favor. If the latter, then he is regarded as an insurer, whose contract, being drawn by the surety himself and for a money consideration, is, if ambiguity exists in the language, to be resolved most strongly against the surety." *Indemnity Co. vs. Granite Co.*, 100 O. S. 373, 126 N. E. 405, 12 A. L. R. 378, note at p. 382, "Liability of Surety Company as Distinguished from that of Gratuitous Surety."

See also *United American Fire Ins. Co. vs. American Bonding Co.*, 146 Wis. 573; 131 N. W. 994; 40 L. R. A. (N.S.) 661, which holds: "The bond in question was an in-

rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties and embodying requirements, compliance with which is made the condition to liability thereon."¹⁰

There is now to be found an almost uniform acquiescence in the statement of a recent case, in which it is said:

"Inasmuch as an indemnitor's liability is one dependent wholly upon the contract, it would be anomalous to hold that he is answerable under conditions directly contrary to the express stipulations of his undertaking.

"When he covenants to be bound, provided certain antecedent conditions are complied with for the party indemnified, in the very nature of things, if those conditions are not fulfilled, his liability never becomes fixed.

"This is so elementary that we do not pause to cite authority in support of it. Giving to the bond of indemnity the most liberal construction contended for, treating it in point of fact as closely akin to a technical policy of insurance, we can not understand how the indemnitor can be held accountable upon it in the teeth of the explicit covenants that it should not be answerable unless designated provisions distinctly declared to be conditions precedent to the validity of the bond have been first complied with."¹¹

The reported cases indicate that the only important innovation thus far made by the courts in construing corporate surety contracts relates wholly to the method of determining the meaning of the language employed in making the contracts:

"It is now well settled that the bond of a Surety Company, like any other insurance policy, is to be most strongly construed against the insurer.

demnity contract entered into by the defendant for a money consideration. It has all the essential features of an insurance contract and should be subject to the rules of construction applicable to such contracts. It is apparent that the bond sued on was prepared by the defendant. As to any ambiguity therein, the provisions, conditions and exceptions of the bond which tend to work a forfeiture should be construed most strongly against the party preparing the contract."

¹⁰ Guaranty Co. of N. A. vs. Mechanics Savings Bank & Trust Co., 183 U. S. 402. See also Granite Building Co. vs. Saville, 101 Va. 217; 43 S. E. 351; U. S. F. & G. Co. vs. Overstreet, 27 K. L. R. 248; 84 S. W. 764.

¹¹ Union Central Life Ins. Co. vs. U. S. F. & G. Co., 99 Md. 423; 58 Atl. 437. See also United States Fidelity and Guaranty Co. vs. French Ins. Co., 212 Fed 620; Leshner vs. U. S. Fidelity Co., 239 Ill. 502, 88 N. E. 208; *ante*, Sec. 73, note 2.

"The language of the bond is that selected and employed by the insurer and when doubtful or ambiguous must be given the strongest interpretation against the insurer which it will reasonably bear."^{1d}

§234. Private and corporate suretyship compared.

Private suretyship is generally for mere accommodation. Corporate Suretyship is a business transaction for profit.

Many instances are likely to arise, however, where private persons engage in suretyship for compensation. The private professional surety who takes up the business for profit was the forerunner of the surety company, and many are still thus engaged.

It is also quite possible for a Corporate Surety to furnish a bond gratuitously. The comparison in these respects therefor, of itself, involves no necessary difference in the legal attitude of the private and corporate Surety.

The important practical contrast between these forms of suretyship is in the language of the contract and the methods of arriving at a mutual understanding, involving at most an inquiry as to the meaning of the words employed.

The private surety who engages in a fidelity bond, or who executes a letter of credit, or a guaranty against a failure of title, or obligates himself upon a judicial or official bond, usually has nothing to do with the making of the contract. He takes little if any thought of the possibility of loss, frequently signing without reading, and generally having only a vague understanding of the scope of the engagement, beyond the fact that it is a bond of some sort.

The law, by its carefully considered precedents, has developed the rules for the determination of the respective rights and liabilities of the parties who contract in this way, making provision for certain defenses in suretyship, such as those resulting from fraudulent concealment, material alteration of the contract, extension of time to the principal and other equitable defenses impressed upon the contract, without any specific reference in the contract to such possible defenses. The law also provides for the remedy of contribution between sureties and the rights of indemnity and subrogation.

^{1d} American Bonding Co. vs. Morrow, 80 Ark. 49; 96 S. W. 613; Philadelphia vs. Fidelity & D. Co., 231 Pa. 208, 80 Atl. 62, Ann. Cas. 1912B, 1085, and cases cited in note

at page 1087; Indemnity Co. vs. Granite Co., 100 O. S. 373, 126 N. E. 405, 12 A. L. R. 378, and note p. 382.

On the other hand the Corporate Surety, except where the form of the contract is prescribed by law, such as some kinds of judicial and official bonds, usually prepares its own contracts, carefully and distinctly defining its rights and liabilities, and in many instances requiring applications to be signed as a preliminary to the bond, wherein the principal and obligee unite in written representations, which become conditions upon the liability recited in the bond, and also setting out in the bond itself the rights and privileges which the law affords to private sureties, such as the privilege of subrogation, and stipulations against fraudulent concealment of facts by the obligee which materially affect the risk, which rights and equities could also be claimed by the Corporate Surety even though not set out in the contract.

The relative legal position of the Private and Corporate Surety is not therefore changed by the fact that the one sets out in its contract the same legal rights which the law imports, even if, as in the case of an accommodation indorser, the contract is evidence only by a signature in blank, except that if the language of the contract is ambiguous it will be strictly construed against the Corporate Surety by resolving all doubts in favor of the beneficiary.^{1e}

If the Private and Corporate Surety each set out the same conditions in their contract, and each fortify themselves by the same preliminary conditions by a written application for the bond, it is clear that the resulting liability is identical in all respects, without regard to the fact that one is corporate and the other not, or that one is compensated and the other gratuitous.

The advantage to all parties and to the courts where the rights of the contracting parties are fully and accurately set down in writing, is manifest, but the legal position of the parties is not thereby changed.

§235. Corporate suretyship and insurance compared.

Insurance is properly comparable with Corporate Suretyship in the sense that it is a business of a quasi-public character and is controlled and regulated by statutes.

Insurance, however, lacks the essential element which distinguishes suretyship from a simple contract.

There are three parties to a suretyship contract, and only two in an insurance contract.

^{1e} *Ante*, Sec. 233.

The promise by one party to answer for the default in the performance of a subsisting contract of another person is the particular feature which gives rise to all the learning in the field of suretyship law.

Insurance is a simple contract of indemnity between two persons, wherein one agrees to compensate the other against loss which results, not because of the breach of the contract of another person, but which arises from an involuntary impersonal cause, such as accident, fire or death.

There is not even a fair analogy to be drawn between the two kinds of contract. The comparison between a suretyship contract and an insurance contract is precisely the same as that which exists between a suretyship contract and any other form of simple contract.

The subject of suretyship arises altogether out of the relation of the promisor, principal and creditor, brought together in one contract, and where this relation exists the rules and equities of suretyship can not be excluded.¹⁷

§236. Corporate suretyship as affected by the premium or compensation paid.

It has sometimes been assumed that the payment of a premium to a Surety Company in some way deprives the Surety

¹⁷ *Ante*, Sec. 233. "The rule of strict construction," it is said in a recent case, "is liable at times to work a practical injustice and it ought not to be extended beyond the reason for the rule, particularly when the surety is engaged in the business of becoming surety for pay and presumably for profit." It may be questioned whether compensation is a proper criterion for discriminating between agreements where the *strictissimi juris* rule is sought to be applied. If the contract is based on an elaborate questionnaire and is for all practical purposes an insurance policy, it should be so treated. But, where the contract of the compensated surety is not essentially different from that of the gratuitous surety, the same rules of interpretation should be applied to both, based on a fair and reasonable construction of their respective obligations. The distinction is, no doubt, in part due to a reluctance to admit that the rule of *strictissimi juris* has little justification in modern

law and may prove the entering wedge for its repudiation. Surety companies it is needless to say are a convenience to the public; it is important that they continue sound and that their rates be as moderate as is commensurate with the risk, and the risk will be lessened by a wise, consistent, and uniform administration of the law of guaranty in all cases. *St. John's College vs. Aetna Indemnity Co.*, 201 N. Y. 335." 66 U. of Pa. Law Review 40, 65; *George A. Hormel & Co. vs. American Bonding Co.*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513; *Gamble-Robinson Co. vs. Mass. Bonding & Ins. Co.*, 113 Minn. 38, 129 N. W. 131; *Shakman vs. U. S. Credit System*, 92 Wis. 366, 53 Am. St. Rep. 920, 66 N. W. 528, 32 L. R. A. 383, holding that the surety company was bound under the rules of the insurance statute, and that the *business* was insurance, but does not decide whether the contract was *suretyship* and controlled by the rules of suretyship law.

of rights and privileges which are enjoyed by a private Surety acting wholly for accommodation.²

The payment of a premium will not of course deprive the surety of any of the provisions expressly contained in the contract, and it has never been urged that because of the receipt of the premium the surety was thereby deprived of his right of indemnity contribution or subrogation, or any of the usual defenses of suretyship such as alteration of the contract, extension of time, or fraudulent concealment of facts material for the surety to know in estimating the risk.^{2a}

The cases which maintain the view that Corporate Suretyship is insurance because of the fact that a premium is paid, make no logical connection between that fact and the judgment rendered.

The premium is less a consideration of Corporate Suretyship contracts than of Insurance contracts. In the latter case it is the sole consideration.

It is doubtful whether it is proper to denominate the premium as a consideration at all in a suretyship contract. It certainly is not the sole consideration. In a great majority of the contracts written by Surety Companies, the premium is paid and contracted for by the principal, while the bond or obligation runs to the creditor. The surety cannot evade the liability to the creditor because the principal fails to pay the premium, neither can the contract be revoked on that account.³

² Walker vs. Holtzclaw, 57 S. C. 459; 35 S. E. 754. "Upon the hearing of the case it was argued that a surety is a favorite of the law, and it (the policy) should be strictly construed in his favor. While this is true as a general rule, it has no application to a case like this, where the surety receives compensation and the suretyship is in the line of its regular business."

^{2a} Lewis Admr. vs. United States Fidelity and Guaranty Co., 144 Ky. 425; 138 S. W. 305. "We are cited to no authority from any court of last resort denying to a surety the right to subrogation because he was a compensated or paid surety. Subrogation is allowed because the surety has paid the debt of his principal. Upon this ground the right rests. The question as to what induced the surety to assume the obligation can

not be considered in determining his rights." See also Baglin vs. Southern Surety Co., 41 App. D. C. 530.

³ A surety company can avail itself of the provisions of Statute, and withdraw from judicial and official bonds in cases where good cause is shown, and it is held that the failure to pay the premium is a good ground for extending the relief afforded by the Statute, but such remedy is not based upon a failure of the consideration, but rests in the discretion of the court and will be applied as a protective measure in favor of a corporate surety.

Amer. Surety Co. vs. Thurber, 162 N. Y. 244; 56 N. E. 631. "Surety companies are a convenience to the community, and it is important that they should continue, sound and able to respond to their obligations. The

The consideration in all suretyship contracts, whether compensated or not, springs from the contract between the principal and creditor. If employment is offered upon the condition that the employee shall furnish a bond to cover the faithful performance of his duties, the consideration of the employment contract is the consideration of the bond, and as to the question of consideration it is of no importance whether the surety is compensated or not.

A premium paid is the bonus or inducement to the Surety Company, but is not the essential consideration out of which the contract grows.

§237. Corporate compensated suretyship is within the statutes of frauds.

The contract of the surety corporation although compensated is within the very letter of the Statute of Frauds. It is a collateral promise to pay the debt or answer for the default of another, and will not be binding unless in writing.

Where the surety is beneficially interested in the carrying out of the main contract, as where the performance of the main contract subserves a pecuniary purpose of his own, his collateral engagement to answer for the due performance of the principal contract is considered outside the provisions of the Statute of frauds and constitutes him an original promisor.⁴

legislature doubtless intended to promote their stability by extending the same protection to them that it extends to other sureties. The contracts of such companies are usually based upon an annual premium for a continuing bond. If the premium were not paid after the first year and the company could not avail itself of the privilege of the statute, its responsibility would continue with no compensation, as the bond would still be in force. No company can do business on such a basis. Moreover, if the annual premiums are paid, but the principal is squandering the estate, how can the surety protect itself? Through

its officers it may inform those interested, and request action on their part; but if they reply, 'You are good and we are safe,' what relief is there unless it is under this section? If it cannot induce those ultimately entitled to the money or property to act, its condition is hopeless and bankruptcy may be the result."

See also *Amer. Surety Co. vs. Nelson*, 77 Minn. 402; 80 N. W. 300. Where it was held that a failure by an assignee to pay the stipulated premium to the surety company executing his bond was ground for his removal.

⁴ *Ante*, Sec. 32. See "Oral Contracts of Fidelity Guaranty," 24 Case and Comment 42 (1917).

But the payment of a premium as an inducement to enter into a suretyship contract does not constitute a novation, as the surety on this account derives no interest in the outcome of the main contract which he secures.

§238. Construction of corporate suretyship contracts.

The doctrine that a surety is a favorite of the law largely disappears in the construction of corporate suretyship contracts. This results not from the fact that the surety is a corporation and compensated, but because of the form of the contract and the manner of its execution.

The same rules of construction must also apply to private accommodation suretyship contracts if made in the same way.

The importance of the so-called doctrine of "favoritism" as applied to promises in suretyship is apt to be considerably over-estimated, and has been talked about in many cases where the question is not at all involved.

The rule that the surety's liability will not be extended by verbal conditions, or that the term of his contract cannot be changed without his consent, or that one party to the contract cannot be released without releasing the other, applies also to any written instrument.

The common expression in construction of ordinary suretyship that "A surety cannot be bound beyond the clear and unequivocal terms of his obligation" is true of a party to **any** contract in writing.

There is after all but a very limited field for the application of the doctrine that the surety is a favorite in the law. He clearly is not a favorite, even though so called, where he is merely given the benefit of rules of construction common to all written contracts.⁵

⁵ Ulster Co. Savings Inst. vs. Young, 161 N. Y. 23; 55 N. E. 483. "The liability of a surety is measured by his agreement, and is not to be extended by construction. His contract, however, is to be in-

terpreted by the same rules which are applicable to the construction of other contracts. The extent of his obligation must be determined from the language employed when read in the light of the circumstances

While these rules of construction are a part of the general law of suretyship they do not constitute its distinguishing features. The great field of special construction in favor of the surety arises from the fact that he is an accommodation party and generally takes no part in the writing of the contract, and the matter being wholly separate and distinct from his own affairs, he gives the business no attention and relies for his protection on the rules of strict construction being applied in his favor, if any doubt arises as to the meaning of his contract. And where the language employed is hastily and loosely written, and the contract prepared for the surety is so constructed that different interpretations may reasonably be given to it, the one imposing a limited liability and the other a more extended or continuing liability, the rules of suretyship will generally impose the more limited construction.

But any contracting party, whether a private or corporate surety acting with or without compensation, whether a party to an insurance contract or a simple written contract of any sort, is estopped from claiming any special construction of ambiguous words which he himself has written, as against any reasonable construction acted upon by the other parties to the contract, and the application of this very self-evident proposition to the business of corporate suretyship, where the contract is drawn by the officers and agents of the surety, and hedged about by the conditions and requirements of the application for the bond, has changed the attitude of the surety to the contract, and made unnecessary and improper any rule of strict construction in favor of the surety.

It is upon this point that the cases turn which are said to support the view that the compensated corporate surety is not a "favorite" in the law, and that the business on this account is like insurance, and that the rules of private suretyship do not apply.

And so in an action upon a fidelity bond executed to a bank surrounding the transaction. Hence, where the question is as to the meaning of the language by which the party has bound itself, there is no difference between the contract of a surety and that of a principal or other party sustaining a different relation."

it was held "if, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the Surety Company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers or agents of the Surety Company. . . . As said by *Lord St. Leonards*, "It (a life policy) is of course prepared by the company and if therefore there should be any ambiguity in it, it must be taken, according to the law, most strongly against the person who prepared it."⁶

The trend of all our modern decisions, Federal and State, is to distinguish between Individual and Corporate Suretyship, where the latter is an undertaking for money consideration by a company chartered for the conduct of such business, in the one case the rule of *strictissimi juris* prevails, as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration, by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material and prejudicial variance.^{6a}

⁶ *Ante*, Sec. 233.

American Surety Co. vs. Pauly, 170 U. S. 133; 18 S. Ct. 552.

See also *Supreme Council vs. Fidelity & Casualty Co.*, 63 Fed. Rep. 48. "The bond is in the terms prescribed by the surety, and any doubtful language should be construed most strongly against the surety, and in favor of the indemnity which the assured had reasonable grounds to expect."

To the same effect see *Bank of Tarboro vs. Fidelity & Deposit Co.*, 128 N. C. 366; 38 S. E. 908.

"The defendant again insists that it should have the same right to limit its liability as is possessed by an individual. That may be; but no member of this Court has ever seen or heard of a bond in such a form being tendered by a private surety. In its very form and essence, the bond before us resembles an insurance contract, and differs materially from the ordinary forms coming down to us by immemorial usage. Therefore, we must place such bonds in the general class of insurance policies, and construe them upon the same general principles; that is, most strongly against

the company and most favorably to their general intent and general purpose."

The foregoing view that the contract of the surety company is to be construed like an insurance contract most strongly against the insurer, results in this case wholly from the form of the contract wherein the details of every right of the surety are fully set out in the writing, and is in no respect a deduction from the fact that the surety is corporate and compensated.

A private surety making the same contract would be subject to the same ruling.

^{6a} *Philadelphia vs. Fidelity & D. Co.*, 231 Pa. 208, 80 Atl. 62, Ann. Cases 1912B, 1085, 1087; *Brown vs. Title Guaranty and Surety Co.*, 232 Pa. 337, 81 Atl. 410; *Young vs. American Bonding Co.*, 228 Pa. 373, 77 Atl. 623; *Philadelphia vs. Rav.*, 266 Pa. 345, 109 Atl. 689; *M. E. Church of Franklin vs. Equitable Surety Co.*, (1921) 269 Pa. 411, 112 Atl. 551; *New Haven vs. National Steam Economizer Co.*, 79 Conn. 482; *Guaranty Co. vs. Pressed Brick Co.*, 191 U. S. 416.

The doctrine thus stated would apply with equal force if the bond had been prepared and executed in the same way by a private surety acting without compensation.

From whatever point of view the question is considered there does not appear to be any good reason for holding that the fact of the surety being corporate and compensated has any bearing upon the contractual relations of the parties.

Where the instrument is not drawn by the surety but is prescribed by the law, such as bonds of public officers or judicial bonds, no distinction in principle exists between private and corporate suretyship, and no distinction has been made by the courts in construing the respective contracts, and the only distinction heretofore made by the courts between corporate and private suretyship contracts, apparently has been limited to the fact, that in the one case the contract is prepared by the surety, and in the other not, resulting in the rule of strict construction against the Corporate Surety in the matter of the interpretation of the meaning of the contract.^{6b}

§239. Surety company bonds as affected by the special stipulations inserted for their protection in the contract.

Many of the conditions and stipulations common to surety company bonds or policies impose limitations upon the liability of the surety which would not be implied by law, if such conditions were not written in the contract. Considerable discussion has arisen as to whether these stipulations made by the surety company in their own interest can be applied so as to work a forfeiture of the bond, where the limitation in terms narrows the liability imposed by law in the case of an ordinary surety.

The view which now prevails as announced by the courts in the later cases establishes the undoubted policy of applying such construction as will prevent a forfeiture of the bond, on account of stipulations which are so worded as to render it nearly impossible to make a claim against the surety company, and at the same time comply with the conditions.

Where the object to be attained in giving bond has been carried out, it is deemed against public policy to so construe a condition in the bond as to give the surety, and the principal whose contract he secures, all the benefits of the arrangement without imposing the burdens.

Contra—In California, a corporate surety stands on the same footing as an individual surety in this regard, and is discharged by a material alteration in the obligation of the principal, to which the corporation surety does not consent.

First Congregational Church of Christ in Corona vs. Lowery, 175 Cal. 124, 165 Pac. 440.

^{6b} *Ante*, Sec. 233.

City of Topeka vs. Federal Union Surety Co., 213 Fed. 958, at page 962, cites all leading cases.

While it is true that where the parties to an agreement have the proper contractual capacity, they will in the absence of fraud or mistake be bound by all the terms of their agreement notwithstanding these terms are much more favorable to one party than the other, yet the law will not sanction a design on the part of one party to so frame his agreement that by its own terms it furnishes an opening for a complete evasion of liability.

The general purpose of suretyship being expressed in the bond, the common law liability of a surety will be enforced, and no mere technical evasion or forfeiture will be tolerated upon the theory that the beneficiary of the bond has specifically contracted for a forfeiture.

But any condition, clearly expressed and not opposed to public policy is valid and will be enforced.^{6b}

§240. Same subject—Stipulation that the obligee shall notify the surety of any act of the principal that "may" involve loss upon the bond.

The law of suretyship gives to the promisor a right of notice of default even though not made a stipulation in his contract, whenever such notice is necessary for his protection, as in the case of a commercial guaranty where the facts upon which his liability rests are not within his knowledge, or depend upon the creditor's option.⁷

So too a stipulation for notice of default under any circumstances will be binding upon the creditor as it is a condition of liability which may always be imposed.^{7a}

But the stipulation for notice of any act of the principal or any facts within the knowledge of the obligee which "may" lead to default and loss to the surety, if not in every case an impossible condition, is in all cases an evasive one and will not be enforced. It puts upon the obligee not merely the duties of observing closely the conduct of the principal, but in addition thereto, charges him with

^{6b} *Livingston vs. Fidelity and Deposit Co.*, 76 O. S. 253; 81 N. E. 330; *Issaquah Coal Co. vs. United States Fidelity & Guaranty Co.*, 126 Fed. 89; *Adelberg vs. United States Fidelity & Guaranty Co.*, 90 N. Y. Supp. 465; *Union Central Life Insurance Co. vs. United States Fidelity & Guaranty Co.*, 99 Md. 423; 58 Atl. 437; *Dorsey vs. Fidelity & Casualty Co.*, 98 Ga. 456; 25 S. E. 521; *Sinclair vs. National Surety Co.*, 132 Ia. 549; 107 N. W. 184; *De Jernette vs. Fidelity and Cas-*

ualty Co., 98 Ky. 558; 33 S. W. 828; *United States Fidelity & Guaranty Co. vs. First Nat. Bank* 233 Ill. 275, 84 N. E. 670; *Title Guaranty & Surety Co. vs. Schmidt*, 213 Fed. 199; *Baglin vs. Southern Surety Co.*, 41 App. D. C. 530.

⁷ *Ante*, Sec. 68.

^{7a} *In School District vs. The Massachusetts Bonding Co.*, 92 Kan. 53, it was held that this condition would not be enforced in the absence of proof that the surety company was injured by lack of such notice.

the duty of determining the character of the acts of the principal, and the probability that a line of conduct apparently innocent may be fraudulent. Such facts although giving rise to suspicion need not be communicated.⁸

Where an agent of an insurance company was required by his contract to remit payments of money collected within a certain time after the close of each month, it was held that while his failure to do so might be reasonable ground for a suspicion that he was in default, yet the insurance company was not bound to put such construction upon the act, and a failure to report this fact to the surety company was not a violation of the stipulation in the bond requiring notice of all acts of the principal which may involve loss on the bond.⁹

The rule relieves the obligee from the responsibility of bad judgment in estimating the effect of the act which finally leads to the loss charged against the bond. It cannot, however, be extended so as to relieve the obligee from the duty of giving notice of specific acts stipulated in the bond, although the

⁸ *American Surety Co. vs. Pauly*, 170 U. S. 133; 18 S. Ct. 552.

In the lower court the jury was charged, "You are to inquire first, when it was that the plaintiff became satisfied that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy. He may have had suspicions of irregularities; he may have had suspicions of fraud, but he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct."

The Supreme Court in approving this charge said: "We perceive no error in these instructions. They are entirely consistent with the terms of the contract. Much stress was laid, in argument, upon the

words 'which may involve loss' in the above extract from the bond. But when those words are taken with the words in the same sentence 'as soon as practicable after such act shall have come to the knowledge of the employer,' it may well be held the Surety Company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion, of the existence of such facts as would justify a careful and prudent man in charging another with fraud and dishonesty."

See also *Bank of Tarboro vs. Fidelity & Deposit Co.*, 128 N. C. 366; 38 S. E. 908; *Ætna Life Ins. Co. vs. Amer. Surety Co.*, 34 Fed. Rep. 291; *Fidelity & Guaranty Co. vs. Western Bank*, 29 Ky. L. R. 639; 94 S. W. 2. ⁹ *Pacific Fire Ins. Co. vs. Pacific Surety Co.*, 93 Cal. 7; 28 Pac. 842.

obligee in good faith considered such acts of no importance and as involving no risk. The federal supreme court in construing a bond containing the condition "the employer shall at once notify the company, on his becoming aware of the said employee being engaged in speculation or gambling," held that the failure of the employer to notify the surety company that he had received such information was a breach of the bond, although the employer believed that the principal had ceased to gamble, and that notice to the surety would be of no importance.¹⁰

The condition usually recited in surety company bonds requiring the obligee to notify the surety promptly of any act of fraud or dishonesty on the part of the principal is intended to extend the common law obligation resting upon the beneficiary of a bond. The private surety whose contract contains no stipulation requiring him to report to the surety as to the conduct of the principal, is deemed guilty of bad faith towards the surety if he continues the principal in his employ, without notice to the surety, after he has knowledge of acts of fraud and dishonesty which increase the peril on the bond, but he does not by implication assume any responsibility of watching the principal in the interest of the surety.¹¹

¹⁰ Guarantee Co. of N. A. vs. The Mechanics Savings Bank & Trust Co., 183 U. S. 402.

Reversing The U. S. Circuit Court of Appeals, 80 Fed. Rep. 766.

Fuller, C. J.: "The company's defense did not rest upon the duty of diligence growing out of the relation of the parties, but on the breach of one of the stipulations entered into by them. The question was not merely whether the conduct of the bank was contrary to the nature of the contract, but whether it was not contrary to its terms. Engagement in speculation or gambling was what the company sought to guard against because experience

had admonished it of the probability that speculation or gambling would lead to acts involving loss for which it would be responsible. . . . The provisions intended to protect the company in this case were not in themselves unreasonable and so far as they operated to compel the bank to exercise due supervision and examination, and due vigilance, were consistent with sound public policy. We think it was the duty of this bank to have made prompt investigation, or at all events to have notified the company at once of the information that it had."

¹¹ Ante Sec. 107.

It is held that these provisions do not enlarge the duty of the obligee where no special stipulation is made for the exercise of diligence in supervising the conduct of the principal, and that the covenant that the obligee shall at once notify the surety of any act of fraud or dishonesty on the part of the principal, only covers such acts as are actually known to the employer, and not those who might have known by the exercise of diligence.¹²

§241. Stipulations discharging surety if claim is not made within a designated time.

In ordinary suretyship the creditor is entitled to assert his claim at any time within the Statute of Limitations.

The business of compensated suretyship cannot, however, be successfully conducted without a more definite and timely demand being made, to enable the corporation to properly adjust its affairs, by anticipating the claims that are to be made upon its resources.

The limitation in the contract requiring proof of loss to be filed within a designated period, and an action to be brought within a definite time, is a valid condition, and a failure to comply with this requirement is a waiver of all right under the bond, and will prevent a recovery.¹³

¹² *Fidelity & Casualty Co. vs. Gate City Nat. Bank*, 97 Ga. 634; 25 S. E. 392, *Lumpkin, J.*: "There is not a syllable in the contract, however, bearing the construction that the bank should exercise any degree of diligence in enquiring into or supervising the conduct of Redwine in order that the company might be saved from loss through his misconduct. The bank did not undertake to exercise reasonable care and diligence to find out if Redwine had become untrustworthy, but as to this matter the company, in effect, invited the bank to repose in peace, for it guaranteed that Redwine would remain honest and faithful. Only after knowledge had actually come to the bank that he was or had become

otherwise was it under any duty to the company; and then it was only required to notify the company of what it had ascertained."

¹³ *California Savings Bank vs. Amer. Surety Co.*, 87 Fed. Rep. 118.

The numerous authorities validating similar provisions in insurance contracts support the rule in principle as applied to corporate sureties. *Insurance Co. vs. McGookey*, 33 O. S. 555; *Quinlan vs. Insurance Co.*, 133 N. Y. 356; 31 N. E. 31; *Riddlesbarger vs. Insurance Co.*, 7 Wall. 386; *Leshner vs. U. S. Fidelity Co.*, 239 Ill. 502; 88 N. E. 208; *Lyons vs. Nat. Surety Co.*, 243 Mo. 607; 147 S. W. 779; *Granite Bldg. Co. vs. Saville's Admr.*, 101 Va. 217; 43 S. E. 351; *Lombard Investment Co. vs. Amer. Surety Co.*, 65 Fed. 476; *Ladies of Maccabees vs. Illinois Surety Co.*, 196 Mich. 27; 163 N. W. 7.

But such condition will not be enforced where the delay is unavoidable. Thus in a case where a bond was given to a Bank insuring the Bank against loss from the dishonesty of its officers, and the Bank examiner took possession of all the books and assets of the Bank, so that although the Receiver gave immediate notice to the surety company of the default of the principal, yet he was prevented from making proof of loss within the limited period by reason of not being able to get access to the books of the Bank. It was held that limitations in this form of contracts would not be applied with the same strictness as Statutes of Limitation, and that where the performance is rendered impossible by the act of the government or the courts, that the right to file the proofs, and bring the action will be extended.¹⁴

§242. Stipulation that the amount paid by surety upon the bond shall be conclusive against the principal in an action by the surety against the principal for indemnity.

The surety cannot enlarge the common law right of indemnity by stipulations in the contract. The principal owes to the surety the duty of full protection, and whether the suretyship is gratuitous or compensated, the principal is bound to reimburse the surety for all moneys paid by the surety upon the obligation of the principal to which the suretyship is collateral.

If the bond in terms stipulates for such indemnity, it adds nothing to the right which the surety enjoys without such covenant.

Where it is stipulated that any voucher which may be executed to the surety for money paid in settlement of claims made upon the bond, shall be conclusive of the amount due in an action for indemnity against the principal, the common law right of indemnity is thereby enlarged, as the amount recoverable is no longer the amount due as shall be ascertained by judicial determination, but such sum as the surety may pay to the creditor, whether more or less than the sum due.

¹⁴ Jackson vs. Fidelity & Casualty Co., 75 Fed. Rep. 359.

Such provision in the contract is void on grounds of public policy. Upon this question it was held "The right of a party to waive the protection of the law is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement by the parties, however expressed. Thus an agreement to waive the defense of usury is void. So also, according to the weight of authority, is an agreement, made at the time of contracting a debt, to waive the prospective right of exemption. The agreement under consideration is more than a mere enlargement of contractual rights, or the establishment of a rule of evidence. It provides that the plaintiff may be his own *ex parte* acts, conclusively establish and determine the existence of his own cause of action. In short, he is made the Supreme Judge of his own case. The case is not at all analogous to the common provisions in building and construction contracts, by which the determination of some third person such as the architect or engineer, as to the amount and character of the work, is made conclusive between the parties, in the absence of fraud or mistake. Nor is it at all analogous to a provision in an executory contract for the sale or manufacture of an article to the satisfaction of the buyer, where, if the article is declined, the parties are in contemplation of the law left in statu quo. In the present case the attempt is to provide that, after the alleged cause of action has accrued, the plaintiff shall be the sole and exclusive judge of both its existence and extent. Such an agreement is clearly against public policy."¹⁵

§243. Contract of the compensated surety valid only as a collateral undertaking.

The compensation received by the corporate surety as the inducement for its undertaking is not of itself sufficient to make the transaction a binding obligation in suretyship. There must be a valid subsisting principal obligation to which the surety's

¹⁵ *Fidelity & Casualty Co. vs. Eichhoff*, 63 Minn. 170; 65 N. W. 351; *Fidelity & Casualty Co. vs. Crays*, 76 Minn. 450; 79 N. W. 531.

A contract to accept the oath or certificate of a third person as conclusive evidence has generally been held valid. The early English precedents show this principle applied to the obligee's proof of the principal's default in suing the surety on a bond of indemnity.

The following American cases, holding valid a clause making a third person's statement *prima facie* evidence only give no difficulty: (1908)—*Security M. L. Ins. Co. vs.*

Aetna Indemnity Co., App. Div. N. Y.; 108 N. Y. Supp. 171 (surety bond); *American Surety Co. vs. Pauly* (followed); *American Surety Co. vs. Pauly*, 170 U. S. 160 (surety-contract, providing that "a written statement of such loss, certified by the duly authorized officer or representative of the employer, based upon the accounts of the employer, shall be *prima facie* evidence thereof"; held valid; that there was "nothing extraordinary or startling" in this agreement). 16 Illinois Law Review 87, 102 to 107; 5 Minn. Law Review 227, 480; 21 Columbia Law Review 192.

contract is collateral, otherwise the undertaking that another will perform an act which he has no obligation to perform, coupled with an agreement to pay a penalty if he fails to do the thing specified, is a mere wager.

The corporate surety sustains the same attitude to this indispensable element of suretyship as in the case of the private surety.

The surety is not concerned with the extent and value of the main contract, as to whether it is profitable or otherwise to the principal contractors, or whether it is a fair and equitable bargain, or whether the apparent obligee is the real party in interest. The important thing, and the only point necessary to be determined in fixing the liability of the surety, is whether it is a binding obligation, and if not, the surety will not be held to his engagement even though he has been paid a premium. Some useless confusion of ideas arises in this connection because of the persistency with which the contract of the corporate surety is sometimes called "insurance," from which is deduced the erroneous notion that the obligee in the bond must have an "insurable interest" in the transaction as a basis of recovery, and is limited in his recovery to the amount of such insurable interest. The insurable interest known to insurance has no necessary relation to contract rights. One may have such interest in property he does not own, but out of which he expects to derive some benefit, and the loss of which would cause him damage; or he may have an insurable interest in the life of another, even though such interest does not arise out of any contract. But a suretyship relation arises only out of a contract relation, and it depends upon the existence of a main contract to which the promise is collateral. The more accurate use of terms would seem to be that no recovery can be had against a corporate compensated surety, except where the cause of action exists against the principal also, and the amount of recovery is limited to the amount of the liability against the principal on the main contract, and the doctrine of "insurable interest" as defined in insurance law has nothing to do with the case.

This familiar rule of private suretyship was applied to a con-

tract of compensated surety, in a case where the bond was to secure the fidelity of an agent, who was employed by a foreign corporation to carry on its business under a contract that was void because of the failure of the corporation to comply with the laws of the state, and the main contract not being enforceable, the surety company was also released.¹⁶

§243a. Joint control of trust funds.

The stipulation in surety bonds that trust funds shall be deposited in a bank named by the surety and drawn out only upon checks countersigned by the surety, so far as it applies to trusts created by law, such as receivers, administrators, guardian, assignees, or any trustee appointed by the Court is against public policy and void.

An officer of the Court is chargeable with the custody and control of all property coming to him as such officer and has no authority to delegate this control to another.

The ruling in England and the United States upon this subject has been stated thus:

“A receiver cannot be permitted to enter into any agreement with his sureties by which he in effect indemnifies them against any loss that may accrue from his dealing with the receivership fund. The security for his good conduct must not be worked out of the estate itself. Nor can he be permitted to put the fund entrusted to his care under their control, or the control of any person appointed by them, but must retain the complete control over it in himself, so as to be able to act with promptitude on any emergency.”¹⁷

¹⁶ McCanna & Fraser Co. vs. Citizens' Trust & Surety Co., 74 Fed. Rep. 597.

See also Electric Appliance Co. vs. U. S. Fidelity & Guaranty Co., 110 Wis. 434; 85 N. W. 638; Amer. Surety Co. vs. United States, 127 Ala. 349; 28 South. 664.

Fidelity & Deposit Co. vs. Singer, 50 Atl. Rep. 518. In this case the action was in replevin, and the bond was made to Singer in his individual capacity, whereas the title to the property was in him in a trust ca-

capacity, and it was held that since there was no subsisting obligation running to him as an individual that the collateral undertaking of the surety must be discharged. The holding in this case is not affected by the fact that the surety was corporate and compensated, but the ruling applies to any surety.

¹⁷ White vs. Baugh, 3 Clark & F. 44, 9 Bligh N. R. 181. See also Fidelity & Deposit Co. vs. Butler, 130 Ga. 225, 60 S. E. 851.

CHAPTER IX.

THE RIGHTS AND REMEDIES OF THE PROMISOR AFTER PAYMENT.

- Sec. 244. Subrogation.
- Sec. 245. Subrogation Arises Only When Claim is Paid in Full.
- Sec. 246. Subrogation is a Mere Equity and Will Not be Applied Against the Legal Rights of Others Dealing with the Principal.
- Sec. 247. The Promisor Who Pays is Entitled to Have the Securities Held by the Creditor Assigned to Him.
- Sec. 248. Subrogation Extends Not Only to Securities, but also to all Remedies of the Creditor.
- Sec. 249. Surety Paying Judgment Against the Principal Will be Subrogated to the Lien and Other Rights of the Creditor Under the Judgment.
- Sec. 250. A Suretyship Promisor Who Pays Will be Subrogated to any Mortgage Security which the Creditors Holds for the Debt.
- Sec. 251. Subrogation Applies to One in the Situation of a Surety.
- Sec. 252. Surety Who Pays the Debt is Entitled to be Subrogated to a Pro Rata Share of any Dividend which is Derived from the Assets of the Principal.
- Sec. 253. Subrogation Among Co-sureties.
- Sec. 254. Subrogation Between Successive Sureties.
- Sec. 255. Subrogation in Favor of the Creditor to Securities Held by the Surety.
- Sec. 256. Same Subject—The View of the English Courts.
- Sec. 257. Remedies of the Surety in Cases Where He is Deprived of Subrogation by Act of the Creditor.
- Sec. 258. When Surety Will be Subrogated to the Principals' Claims of Set-off Against the Creditor.
- Sec. 259. Subrogation not Available to One Who Pays the Debt of Another as a Mere Volunteer.
- Sec. 260. Conventional Subrogation.
- Sec. 261. Waiver of Subrogation.
- Sec. 262. Contribution Between Co-sureties—General Principles.
- Sec. 263. Contribution Between Sureties Bound by Different Instruments.
- Sec. 264. A Surety for a Surety Not Liable in Contribution.
- Sec. 265. Contribution as Affected by Special Contract Between Sureties.
- Sec. 266. Contribution Between Persons in the Situation of a Surety.
- Sec. 267. One Who Becomes Surety at the Request of a Co-surety is Liable in Contribution to such Co-surety.

- Sec. 268. One Who Aids in the Commission of the Default is Barred from the Right of Contribution.
- Sec. 269. When Contribution May be Enforced.
- Sec. 270. Equitable Contribution or the Right of a Surety to Call Upon His Co-surety for Exoneration Before Payment.
- Sec. 271. Amount Recoverable in Contribution.
- Sec. 272. Contribution as Affected by the Insolvency of One or More Co-sureties.
- Sec. 273. Contribution as Affected by Absence from the Jurisdiction or by the Death of a Co-surety.
- Sec. 274. Surety Seeking Contribution Must Account to His Co-sureties for Indemnity Furnished Him by the Principal.
- Sec. 275. Surety May Enforce Contribution, Even Though Payment by Him was Without Compulsion.
- Sec. 276. Contribution as Affected by the Release of One of Several Co-sureties.
- Sec. 277. Bankruptcy of a Surety—Effect on Co-surety's Right of Contribution.
- Sec. 278. Contribution Between Parties to Bills and Notes.
- Sec. 279. The Right of Indemnity Against the Principal.
- Sec. 280. When Right of Indemnity Arises
- Sec. 281. Equitable Exoneration.
- Sec. 282. Right of Indemnity Arises from Payment or Transactions Equivalent to Payment.
- Sec. 283. Amount Recoverable by Indemnity Proceedings.
- Sec. 284. Right of Indemnity as Affected by the Non-liability of the Principal.
- Sec. 285. Right of Indemnity as Affected by the Non-liability of the Surety or Guarantor.
- Sec. 286. When Judgment Against the Surety or Guarantor is Conclusive as to the Right to Recover Indemnity.
- Sec. 287. Indemnity as Affected by the Bankruptcy of the Principal.

§244. Subrogation.

Subrogation in Suretyship is "a mode which equity adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay."¹

The scope of the right of subrogation consists in the immediate transfer, by operation of law, to the promisor in suretyship, of all the rights of the creditor against the principal whenever the promisor pays the debt or satisfies the obligation.

¹ McCormick vs. Irwin, 35 Pa. 117; Lewis' Admr. vs. U. S. F. & G. Co., 138 S. W. 305; 144 Ky. 425; Thompson vs. Davis, 297 Ill. 11, 16; 130 N. E. 455.

The right is not dependent upon

whether the surety was or was not paid to sign the bond. It is enough that the surety was obliged to pay and did pay the debt. Wasco County vs. N. E. Equitable Ins. Co., 88 Oregon 465; 172 Pac. 126.

This right of subrogation is independent of any agreement and rests upon principles of natural justice and equity.²

It is the exercise of a power inherent in that branch of remedial justice which is administered by the Courts of Equity.

Subrogation is not limited in its application to transactions in suretyship. Whenever one pays the debt of another, although under no obligation to do so, if the payment was necessary for the protection of his own interests, the equity of subrogation arises.³

Thus where a purchaser of land, which was warranted free

² *Hodgson vs. Shaw*, 3 Myl. & K. 183, *Lord Brougham*: "The rule is undoubted, and it is founded upon the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor and have all the rights which he has, for the purpose of obtaining his reimbursement. It is hardly possible to put this right of substitution too high, and the right results more from equity than from contract or quasi contract; unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication.

. . . A surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor."

Hayes vs. Ward, 4 Johns. Ch. 130, *Kent, C.*: "This doctrine does not belong merely to the civil law system. It is equally a settled principle in the English chancery, that a surety will be entitled to every rem-

edy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor, and have his securities transferred to him, and to avail himself of those securities against the debtor. This right of the surety stands not upon contract, but upon the same principal of natural justice upon which one surety is entitled to contribution from another."

Mathews vs. Aikin, 1 N. Y. 595, *Johnson, J.*: "I agree fully with the learned judge who delivered the opinion of the Supreme Court, that the right of the surety to demand of the creditor whose debt he has paid, the securities he holds against the principal debtor and to stand in his shoes, does not depend at all upon any request or contract on the part of a debtor with the surety, but grows rather out of the relations existing between the surety and the creditor, and is founded not upon any contract, express or implied, but springs from the most obvious principles of natural justice."

Robertson vs. Sullivan, 59 So. 846; 102 Miss. 581.

³ *Gaskill vs. Wales*, 36 N. J. Eq. 527; *Cockrum vs. West*, 122 Ind. 372; 23 N. E. 140; *Murray vs. O'Brien*, 105 Pac. 840; *Lackawanna Trust & Safe Deposit Co., vs. Gomerlinger*, 236 Pa. 179; 84 Atl. 757.

from incumbrance, finds it to be subject to a judgment lien, and to prevent a sale on execution, he pays the judgment, he is at once subrogated to the position of the creditor, and if the judgment was a lien upon other lands of his vendor, he may have execution on his own account.⁴ The same rule applies where a junior mortgagee is compelled to pay a prior incumbrance to prevent foreclosure at a time or under circumstances that would defeat his claim.⁵

The principles of subrogation as applied in transactions other than suretyship may be further illustrated in a case where a loan was made with the understanding that it was to be used in paying off all incumbrances upon certain land, and that a mortgage was to be executed as security which would thereby become a first lien. The mortgage when executed being defective and invalid, it was held that the one advancing the money ought to be subrogated to the rights of the prior incumbrancers whose claims had been paid off by him.⁶

If the prior liens had been assigned to the one advancing the consideration for their discharge, his rights to enforce them could not be questioned, and because of the manifest justice

⁴ Beall vs. Walker, 26 W. Va. 741.

See also Hancock vs. Fleming, 103 Ind. 533; 3 N. E. 254; Warren vs. Hayzlett, 45 Iowa 235.

Arnold vs. Green, 116 N. Y. 566; 23 N. E. 1, *Vann, J.*: "This appeal presents the single question whether, under all the circumstances of the case, the defendant should have been substituted in the place of Mr. Wadsworth as the owner of the mortgage in question. Did he by the fact of payment become the equitable assignee of the security and entitled to enforce it for his own reimbursement and the protection of his interest in the land? Under some circumstances the payment of a mortgage does not satisfy it or destroy its lien, because equity regards the

person making the payment as the owner thereof for certain definite purposes and keeps it alive and preserves its lien for his benefit and security. According to the well-established principles upon which the doctrine of equitable assignment by subrogation rests, if the person paying stands in such a relation to the premises that his interest, whether legal or equitable, cannot otherwise be adequately protected, the transaction will be treated in equity as an assignment."

⁵ Porter vs. Vanderlin, 146 Pa. 138; 23 Atl. 350; Hull vs. Godfrey, 31 Neb. 204; 47 N. W. 850; Twombly vs. Cassidy, 82 N. Y. 159.

⁶ Amick vs. Woodworth, 58 O. S. 86; 50 N. E. 437.

of the claim, equity dispenses with the formality of the assignment in cases where the necessity for protection arises.^{6a}

Subrogation in all its phases appeals to the conscience of the Court, and the Court is clothed with wide discretion in its application.⁷

By statute, in England, whoever pays the debt of another as surety is entitled to have assigned to him all securities held by the creditor as well as any judgment which the creditor may have obtained against the principal.⁸ The English statute is clothed in the language of the English common law and is everywhere the law.⁹

^{6a} *Southern Cotton Oil Co. vs. Napoleon Hill Cotton Co.*, 158 S. W. 1082; 108 Ark. 555.

⁷ *Acer vs. Hotchkiss*, 97 N. Y. 402, *Finch, J.*: "The doctrine of subrogation is a device to promote justice. We shall never handle it unwisely if that purpose controls the effort, and the resultant equity is steadily kept in view"

⁸ *Mercantile Law Amendment, Statute 19 & 20 Vic., c. 97, s. 5*: "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt, or performance of the duty, and such person shall be entitled to stand in the place of the creditor and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action, or other proceeding, at law or in equity, in order to obtain from the principal

debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid, such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided, always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

⁹ *Lewis vs. Palmer*, 28 N. Y. 271; *State Bank vs. Smith*, 155 N. Y. 185; 49 N. E. 680; *Billings vs. Sprague*, 49 Ill. 509; *Beaver vs. Slanker*, 94 Ill. 175; *Young vs. Vough*, 23 N. J. Eq. 325; *Klopp vs. Lebanon Bank*, 46 Pa. 88; *Fawcetts vs. Kimmey*, 33 Ala. 261; *Torp vs. Gulseth*, 37 Minn. 135; 33 N. W. 550; *Allison vs. Sutherland*, 50 Mo. 274; *Scribner vs. Adams*, 73 Me. 541; *Guthrie vs. Ray*, 36 Neb. 612; 54 N. W. 971; *Aetna Co. vs. Thompson*, 68 N. H. 20; 40 Atl. 396; *Liles vs. Rogers*, 113 N. C. 197; 18 S. E. 104; *Nat. Bank vs. Cushing*, 53 Vt.

The promisor in suretyship may be subrogated to the securities held by the creditor even though he made his contract without any knowledge that the creditor held such securities.¹⁰ The right also attaches whether the securities come into the possession of the creditor before or after the execution of the suretyship contract.¹¹

§245. Subrogation arises only when claim is paid in full.

The claim of the creditor must be fully satisfied before there can arise any equity of subrogation.

The creditor's right to the possession of all the securities is superior to the equity of the surety or guarantor, and the creditor is not obliged to suffer the inconvenience or risk of parting with any of his resources until the debt is paid in full,¹² unless the creditor consents.¹³

321; *James vs. Jacques*, 26 Tex. 320; *Rand vs. Barrett*, 66 Iowa 731; 24 N. W. 530.

Lidderdale vs. Robinson, 2 Brock. 159, *Marshall, C. J.*: "Where a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible, shall be clothed with the legal garb with which the contract he has discharged was invested, and he shall be substituted, to every equitable extent and purpose, in the place of the creditor whose claim he has discharged."

¹⁰ *Dempsey vs. Bush*, 18 O. S. 376; *Hevener vs. Berry*, 17 W. Va. 474; *Mayhew vs. Crickett*, 2 Swanst. 185; *Forbes vs. Jackson*, 19 Ch. D. 615; *Lake vs. Brutton*, 8 De G. M. & G. 440; *Duncan vs. North & South Wales Bank*, 6 Appeal Cases 1.

¹¹ *Havens vs. Willis*, 100 N. Y. 482; 3 N. E. 313; *Brandon vs. Brandon*; 3 De G. & J. 524.

¹² *Ames vs. Huse*, 55 Mo. App. 422; *Commonwealth vs. Ches. &*

Ohio Canal Co., 32 Md. 501; *Brough's Estate*, 71 Pa. 460; *Musgrave vs. Dickson*, 172 Pa. 629; 33 Atl. 705; *McGrath vs. Carnegie Trust Co.*, 221 N. Y. 92; 116 N. E. 787; 21 Columbia Law Review 293; *Barton vs. Matthews*, 141 Ark. 262; 216 S. W. 693; 9 A. L. R. 1592, at page 1596, note, "Payment of entire claim of third person as condition of subrogation."

Barton vs. Brent, 87 Va. 385; 13 S. E. 29; *Covey vs. Neff*, 63 Ind. 391; *Vert vs. Voss*, 74 Ind. 566; *Bartholomew vs. First Nat. Bank*, 57 Kan. 594; 47 Pac. 519; *Conwell vs. McCowan*, 53 Ill. 363; *Coe vs. N. J. Midland Ry. Co.*, 31 N. J. Eq. 106; *Rice vs. Downing*, 12 B. Mon. (Ky.) 44; *City of Keokuk vs. Love*, 31 Iowa 119; *Schoonover vs. Allen*, 40 Ark. 132; *Gannett vs. Blodgett*, 39 N. H. 150; *Jones vs. Harris*, 90 Ark. 51; 117 S. W. 1077.

¹³ *Fisher vs. Columbia Bldg. & Loan Assn.*, 59 Mo. App. 430; N. J.

"When his debt has been only partially paid, it would be unreasonable to hold that the third party who made such payment thereby acquired a precedence over him, or was even placed on an equal footing, in reference to the security for the payment of the remainder of his debt." ¹⁴

The payment need not be made wholly by the surety. If the principal pays a portion of the debt, the surety on the payment of the balance may be subrogated. ¹⁵

Where the creditor holds security for several obligations of the principal for some of which another is surety, the latter, although paying the entire debt for which he is surety cannot be subrogated to the securities until all the debts are satisfied for which the collaterals are held. ¹⁶

The same principle applies when the creditor has security for a debt payable by installments and a surety is personally bound for one installment. ¹⁷

Midland R. R. Co. vs. Wortendyke, 27 N. J. Eq. 653.

¹⁴ Cason vs. Connor, 83 Tex. 26; 18 S. W. 668.

See also Graff & Co.'s Estate, 139 Pa. 69; 21 Atl. 233, *Mitchell, J.*: "However small the real debt to which the mortgage may be reduced, he is not only entitled to the whole land for its security and ultimate payment, but also to the sole and unimpeded possession, direction, and control of the mortgage and of all actions, remedies, or arrangements that they may desire to take thereon."

¹⁵ Neal vs. Buffington, 42 W. Va. 327; 26 S. E. 172; Magee vs. Leggett, 48 Miss. 139; Hess's Estate, 69 Pa. 272; Journal Publishing Co. vs. Barber, 165 N. C. 478; 81 S. E. 695.

¹⁶ Wilcox vs. Fairhaven Bank, 7 Allen 270, *Merrick, J.*: "It is obvious that, in order to become entitled to such substitution, he must first pay the whole of the debt or debts

for which the property is mortgaged or the collateral security is given to the creditor; for it would be manifestly unjust, and a plain violation of his rights, to compel him to relinquish any portion of the property before the obligation for the performance of which it was conveyed to him as security has been fully kept and complied with."

Sipe vs. Taylor, 106 Va. 231; 55 S. E. 542; Finnell vs. Jas. H. Goodman Co. Bank, 156 Cal. 18; 103 Pac. 483.

¹⁷ Carithers vs. Stuart, 87 Ind. 424; Massie vs. Mann, 17 Iowa 131.

Contra—Lynch vs. Hancock, 14 S. C. 66.

Ward vs. Nat. Bank of New Zealand, 8 New Zealand, L. R. 10; where it was held that where one is surety for a part of the debt he is entitled, on payment of that part, to be subrogated to a proportionate share of the securities which the creditor holds for the whole debt.

§246 Subrogation is a mere equity and will not be applied against the legal rights of others dealing with the principal.

A surety who pays the debt of another will be subrogated to the remedies of the creditor in those cases where the transaction interferes with no vested rights of other persons in their relations with the principal.

If the payee of a promissory note obtains judgment against the maker and the indorser, and the maker gives bond in stay of execution with another as surety, the latter by paying the judgment is not subrogated to the rights of the creditor against the indorser.

It is one of the fixed rights of an indorser to pay the debt at maturity, and proceed for his indemnity against the maker. This valuable right is infringed and action upon it stayed by the act of the surety in executing the bond. The surety upon the bond cannot place the indorser in this position and then enforce payment from him under his so called equity of subrogation.¹⁸

If a person is surety for a debt, or indorser upon a note, or in any position of suretyship and judgment is entered against the principal, such liability continues even though the principal secures a stay of execution, since the right to have stay of execution by giving bond must be considered as having been in the contemplation of the parties at the time the suretyship contract was made, and if the principal fails to pay at the expiration of the stay the creditor may exercise his option to proceed against the original suretyship obligation or against the stay bond.

If he proceeds against the former, the promisor may be subrogated to the creditor's right on the stay bond,¹⁹ but if the pay-

¹⁸ Allegheny Valley R. Co. vs. Dickey, 131 Pa. 86; 18 Atl. 1003; Bohannon vs. Combs, 12 B. Mon. (Ky.). 577.

¹⁹ Schnitzel's Appeal, 49 Pa. 23;

Denier vs. Myers, 20 O. S. 336; Hanby's Adm. vs. Henritze's Admr., 85 Va. 177; 7 S. E. 204; Friberg vs. Donovan, 23 Ill. App. 58.

ment comes from the stay bond, the debt is thereby discharged as against all prior parties.

It is by the application of this rule that the rights between sureties upon successive appeal bonds are adjusted.

If bond is given in appeal and judgment is rendered against the appellant, it is the right of the surety to pay the judgment and be at once subrogated to the rights of the creditor upon the judgment: but if a subsequent or second appeal is taken with new sureties, the latter will not be subrogated to the rights of the creditor upon the first bond although the creditor may proceed upon either bond at his option.

The last bond is in derogation of the rights of the first sureties and no liability exists against them in favor of the last promisors.

Where successive appeal bonds were given it was said in reference to the rights of the last bondsmen, "But for their intervention the judgments may have been collected of the defendant therein. They secured the delay by agreeing to pay the judgment. The present defendants may have been injured, and justice would seem to demand, that between parties thus situated the primary liability should rest upon those who intervened to procure the delay. It is a general rule that sureties, upon payment, are entitled to be substituted to all the rights and remedies of the creditor as to any fund, lien or equity to which the latter may resort for payment, and in equity are entitled to the benefit of any judgment or instrument against the principal. This right of substitution does not depend upon contract but upon principles of equity arising out of the relation of principal and surety, and the obligation of the former to indemnify the latter against loss. Upon the affirmance of the judgments at the General Term, these defendants had a right to pay the same as sureties, and to be substituted to the rights of the plaintiff in the judgments and to enforce the same against the defendants therein.

"In that case, upon appeal to the Court of Appeals, the undertaking would necessarily inure to the benefit of the defendants as equitable owners of the judgments, and upon affirmance

in the Court of Appeals they could enforce it against the second sureties. The latter agreed, upon the contingency of affirmance, to stand in the place of their principal, the defendant in the judgments, and to pay the judgments. In effect they became sureties to and not for these defendants, and, hence, would not have been entitled, upon payment, to substitution against them."²⁰

§247. The promisor who pays is entitled to have the securities held by the creditor assigned to him.

Subrogation carries with it the right, on the part of the promisor who pays the debt of another, not merely to require the creditor to turn over such corporeal property which he holds as security, but also by proper assignment to substitute the surety as pledgee of all collateral or incorporeal securities and place the surety or guarantor in such position in reference thereto that they may enforce the collateral in their own name, and if the creditor does not upon demand make such assignment, the promisor may enforce the right by action.

This right is of special importance where the creditor has a judgment for the debt which is a lien upon the lands of the debtor, or if no such lien exists where the assignment of the judgment would enable the promisor to acquire such lien.

It is accordingly held that a surety who pays a judgment is entitled to have an assignment of the judgment to himself.²¹

²⁰ *Hinckley vs. Kreitz*, 58 N. Y. 583, 590.

Where in a legal proceeding there are successive sureties, the last surety is regarded as the primary one; and, if he pays the debt of his principal, he has no right of subrogation against the preceding sureties. *National Surety Co. vs. White*, 21 Ga. App. 471; 94 S. E. 589.

Contra—*Howe vs. Frazer*, 2 Rob. (La.) 424.

See also *Holmes vs. Day*, 108

Mass. 563, where it is held that neither set of sureties in successive judicial bonds is entitled to subrogation against the other.

²¹ *Townsend vs. Whitney*, 75 N. Y. 425; *Creager vs. Brengle*, 5 Harr. & J. (Md.) 234; *Kramer vs. Bankers' Surety Co.*, 90 Neb. 301; 133 N. W. 427.

It is also held in Maryland that the payment of the judgment by the surety, of itself, in equity, operates

If there is no judgment, he is entitled to have the original debt assigned to him.²²

§248. Subrogation extends not only to securities but also to all remedies of the creditor.

The payment by a promisor in suretyship of obligations of the principal subrogates the promisor to all the rights of action which the creditor might have maintained against parties whose wrongful dealings with the principal were the cause of the default.

Thus where a receiver used trust funds in paying his individual debt at a bank, the bank having knowledge of the trust char-

as an assignment of the judgment, so as to enable him to have execution for his own benefit. *Crisfield vs. State*, 55 Md. 192; *Potvin vs. Meyers*, 27 Neb. 749; 44 N. W. 25; *Burke vs. Lee*, 59 Ga. 165; *Benne vs. Schnecko*, 100 Mo. 250; 13 S. W. 82.

In Kansas the code provides for an assignment of a judgment to a surety who pays. *Harris vs. Frank*, 29 Kan. 200.

If the judgment is assigned to the surety he may have execution on his own behalf, or a revival of the judgment lien on the land of the debtor, if such lien has become dormant. *Harper vs. Kemble*, 65 Mo. App. 514.

²² *Sublett vs. McKinney*, 19 Tex. 438, *Wheeler, J.*: "It is the doctrine of the Civil Law, and it was the doctrine of the Court of Chancery in England in the time of Lord Hardwick, that the surety is entitled upon the payment of the debt of the principal, not only to have the full benefit of all the collateral securities, both of an equitable and legal nature, which the creditor has taken as an additional pledge for his debt,

but he is entitled to be substituted, as to the very debt itself, to the creditor, and to have it assigned to him."

Lumpkin vs. Mills, 4 Ga. 349, *Nisbet, J.*: "Now, what I have to say in reference to this reason, is this—it applies with equal force in favor of the surety's right to the transfer of the debt itself, as in favor of his right to a transfer of the collateral securities. He is entitled to the latter, not by contract, but according to the principles of natural reason and justice. By these principles, he is made to stand in the place of the creditor. And so standing, the right of collateral securities follows. Here is the doctrine of *substitution* recognized, and the powers of a Court of Chancery are invoked to give it effect. . . . The substitution of the surety is not for the creditor as he stands related to the principal *after* the payment, but as he *stood* related to him *before* the payment. He is subrogated to such rights as the creditor then had against the principal."

The only element of substitution in subrogation is of one *person* in the place of another, and the person so substituted can exercise no right not possessed by his predecessor, and can only exercise such right under the same conditions and limitations as were binding on his predecessor. *Poe vs. Phila. Casualty Co.*, 118 Md. 347; 84 Atl. 476.

acter of the funds, and the receiver being in default, his surety, after payment, brought action against the bank claiming to be subrogated to the rights of the creditor to subject the trust funds, the Court said: "The result of the authorities is that the surety who has paid the debt of his principal is, upon the equity which springs out of the relation of principal and surety, and the fact of his payment, subrogated to all the rights and remedies of the creditor. It may, therefore, be stated that the right of a surety, when he has paid the debt of his principal, to invoke the doctrine of subrogation is not dependent upon whether he has recovered judgment against the principal and issued thereon execution which has been returned *nulla bona*, as it does in cases where a creditor by a creditor's bill seeks the aid of a court of equity to obtain relief. . . . It is stated to be a rule deducible from many authorities, that a bank cannot use a deposit to pay the individual debt of the depositor due it when it has knowledge that the deposit is held by the depositor in a fiduciary capacity and does not belong to him personally. . . . It seems, therefore, clear to us that the defendant was liable to the beneficiaries in the partition suit for the amount of money collected by them for the receiver and applied to the payment of his individual indebtedness to it, and that it follows as an inevitable corollary to this proposition that the plaintiffs, who were compelled as sureties for the receiver on his bond to pay the amount specified in the order of the court to the beneficiaries, in consequence thereof, became in equity subrogated to their rights as respects the fund which was held for their use by the defendant, and are entitled to recover the same in this action."²³

²³ Clark vs. First Nat. Bank, 57 Mo. App. 277.

See also Blake vs. Traders Nat. Bank, 145 Mass. 13; 12 N. E. 414. In this case a trustee pledged bank shares belonging to his trust as a security for his individual debt. His successor in the trust recovered from the surety the value of the stock so

converted, and the surety brought action against the pledgee. Held—"The payment was to the trustees, and was a substitute for the fund which was in the hands of the defendant, and which it was bound to account for to the trustees, and would give to the surety all the rights which the trustees had to

So also where an administrator misapplies assets in his hands and invests them for his own account, the creditors of the estate have the option to go against the bond of the administrator, or pursue the fund if they are able to trace and identify it,²⁴ and if they elect to collect from the sureties, the latter will be subrogated to their rights to subject the funds.²⁵

Where the bond is to secure the purchase price of property, the vendor reserving title, a payment by the surety subrogates him to the right of the vendor to maintain ejectment against the purchaser, or those claiming under him.²⁶

recover the fund; it would operate as an assignment to the surety of the fund, and of the right of action of the trustees to recover it. In this case, the defendant and the surety were both liable to the trustees for the amount of the trust property; the former, in consequence of participating in the wrongful act of the first trustee; and the latter, by his contract to indemnify the estate against such act. The cases are analogous where one owner of property has claims for a loss against an insurer and a tort-feasor. The insurer is in the nature of a surety, and, upon paying the loss he is subrogated to the rights of the owner to recover for the tort. *Hart vs. Western Railroad*, 13 Met. 99; *Clark vs. Wilson*, 103 Mass. 219; *Mercantile Ins. Co. vs. Clark*, 118 Mass. 288." *National Surety Co. vs. State Savings Bank*, 156 Fed. 21; *American National Bank vs. Fidelity & Deposit Co.*, 58 S. E. 867; *U. S. F. & G. Co. vs. People's Bank*, 157 S. W. 414.

See also *Powell vs. Jones*, 1 Ired. Eq. (N. C.) 337; *Cowgill vs. Linville*, 20 Mo. App. 138.

The right of subrogation will not be available in following trust funds where it is shown that the one receiving the fund had no knowledge of its trust character. *Brown vs. Houck*, 41 Hun 16.

²⁴ *Neely vs. Rood*, 54 Mich. 134; 19 N. W. 920.

²⁵ *Pierce vs. Holzer*, 65 Mich. 263; 32 N. W. 431, *Champlin, J.* "The law subjects the assets of a deceased person to the payment of his debts, and for this reason the creditor has an equitable lien thereon, which he can enforce through the administrator in a proper case for equitable interference. The misapplication of the assets to the injury of the creditors, and neglect to pay after an order of distribution, is such a case. In such case the creditor can follow the fund, if he can trace it in its changed form, in the hands of the trustee or purchaser with notice, and upon a familiar principle, the surety who satisfies the debt is entitled to the securities against the principal debtor that the creditor has for reimbursement."

See also *Wheeler vs. Hawkins*, 116 Ind. 515; 19 N. E. 470; *Scott vs. Patchin*, 54 Vt. 253; *Stetson vs. Moulton*, 140 Mass. 597; 5 N. E. 809; *Gilbert vs. Neely*, 35 Ark. 25; *Brown vs. Houck*, 41 Hun 16; *Harris vs. Harrison*, 78 N. C. 202; *Rice vs. Rice*, 108 Ill. 199; *Kennedy vs. Pickens*, 3 Ired. Eq. (N. C.) 147; *Farmers & Traders Bank vs. Fidelity & Deposit Co.*, 22 Ky. L. Rep. 22; 56 S. W. 671; *Skipwith vs. Hurt*, 94 Tex. 322, 60 S. W. 423.

²⁶ *Fulkerson vs. Brownlee*, 69 Mo. 371.

The rights of a judgment creditor to subject assets of the debtor by creditors' bill is transferred by subrogation to the surety who pays the judgment, and the surety may recover any fund or equity owing the principal which the creditor might have pursued.²⁷

The surety may maintain an action to set aside a fraudulent conveyance in the right of the creditor by paying the debt of the fraudulent grantor.²⁸

Where a surety of a sheriff paid a loss resulting from the misconduct of the sheriff's deputy, it was held that he was entitled to be subrogated to the rights of the sheriff upon the bond of the deputy.²⁹

If the debt which the surety pays is entitled to priority, the

A surety for the purchase price has a right of subrogation to the vendor's lien. *Ballew vs. Roler*, 124 Ind. 557; 24 N. E. 976; *Tuck vs. Calvert*, 33 Md. 209; *Stenhouse vs. Davis*, 82 N. C. 432; *Myres vs. Yapple*, 60 Mich. 339; 27 N. W. 536; *Torp vs. Gulseth*, 37 Minn. 135; 33 N. W. 550; *Deitzler vs. Mishler*, 37 Pa. 82; *Ghiselin vs. Ferguson*, 4 Har. & J. (Md.) 522; *Knickerbocker Trust Co. vs. Carteret Steel Co.*, 82 Atl. 146.

²⁷ *Wittick vs. Wilkins*, 7 Heisk. (Tenn.) 307; *Sweet vs. Jeffries*, 48 Mo. 279.

²⁸ *Tatum vs. Tatum*, 1 Ired. Eq. (N. C.) 113. The right of a surety to set aside a fraudulent conveyance dates from the time of the execution of the suretyship contract and not merely from the time when he pays the debt of his principal, although he can not bring such action until after payment. It is necessary for the protection of the surety that his right of subrogation, when completed by payment, should relate back to the beginning of the transaction as otherwise an intervening fraudulent conveyance would render the right of subrogation of no value. *Hatfield vs. Merod*, 82 Ill. 113; *Keel vs. Larkin*, 72 Ala. 406;

Loughridge vs. Bowland, 52 Miss. 546; *Sargent vs. Salmond*, 27 Me. 539; *Dudley vs. Buckley*, 68 W. Va. 630; 70 S. E. 376.

²⁹ *Brinson vs. Thomas*, 2 Jones Eq. (N. C.) 414. Where a sheriff takes indemnity against loss resulting from his official acts, and his sureties are required to pay damages, they may resort to the indemnity.

People vs. Schnyler, 4 N. Y. 183, *Gardiner, J.*: "The action of trespass against sheriffs for the seizure of property in the execution of legal process, is *sui generis*. It is regarded by the law in many instances as a means of determining the title to property, rather than in the light of an ordinary trespass. Good faith on the part of the officer is presumed, and he may consequently require and receive indemnity before proceeding to the final execution of the writ. The form of the indemnity in this case was prescribed by statute, and the sheriff made the sole judge of its sufficiency. His sureties, on payment of the judgment against their principal, would be entitled to subrogation, and to the benefit of his security." *Dine vs. Donnelly*, 121 S. W. 685.

creditor's right to claim such priority inures to the surety; as where the debt runs to the government, the surety is subrogated to the priority of the government.³⁰

It has been held that where a note contained the stipulation that if not paid at maturity judgment might be entered for the amount of the note and interest and 10 per cent. additional as attorney's fees, and the surety paid the note at maturity, he was entitled to be subrogated to the rights of the holder and to recover from the maker the amount which he paid and the 10 per cent. additional stipulated as attorney's fees.³¹

A surety who pays may be subrogated to all the remedies of the creditor upon the principal obligation and may maintain action on the main contract against a co-surety.³²

A surety upon a building contract, who completes the build-

³⁰ Hunter vs. United States, 5 Pet. 173.

See also Boltz's Estate, 133 Pa. 77; 19 Atl. 303; Whitbeck vs. Ramsay's Estate, 183 Ill. 550; Richeyson vs. Crawford, 94 Ill. 165; Stokes vs. Little, 65 Ill. App. 255; Irby vs. Livingston, 81 Ga. 281; 6 S. E. 591; Title Guarantee & Trust Co. vs. Haven, 89 N. E. 1082; State vs. Reid, 6 Cal. A. 686; 47 So. 912; Pond vs. Dougherty, 92 Pac. 1035; Lewis' Admr. vs. U. S. F. & G. Co., 138 S. W. 305; American Bonding Co. vs. Reynolds, 203 Fed. 356.

The general rule is that where a surety has discharged the obligation of the principal, he has the right and equity to be subrogated to the rights of the creditor with respect to any security which he holds against the principal. Liles vs. Rogers, 113 N. C. 197; 18 S. E. 104; Brown vs. Rouse, 125 Cal. 645; 58 Pac. 267; Colt vs. Sears Commercial Company, 20 R. I. 64; 37 Atl. 311. However, by the majority rule subrogation is not allowed to work loss or injury to a lien or preferred creditor whose claim has not been wholly discharged, although the surety may have paid in full his obligation for part of it. U. S. vs. National Surety Co., 254 U. S. 73

(1920); Child vs. New York & New England R. R. Co., 129 Mass. 170; Kuaffel vs. Banking Co., 133 Tenn. 65; 179 S. W. 629. If a surety, in making partial payment, should become entitled to subrogation *pro tanto*, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and in case the property were insufficient to pay the remainder of the debt, the loss would then fall proportionately on creditor and surety. The courts hold that it would be inequitable for a surety, who has guaranteed part of the debt, thus to prevent the creditor from getting full satisfaction of his claim.

³¹ Carpenter vs. Minter, 72 Tex. 370; 12 S. W. 180; Beville vs. Boyd, 16 Tex. Civ. App. 491; 41 S. W. 670; 42 S. W. 318.

See also Josselyn vs. Edwards, 57 Ind. 212.

But see Waldrup vs. Black, 74 Cal. 409; 16 Pac. 226.

³² Howland vs. White, 48 Ill. App. 236; Kimmel vs. Lowe, 28 Minn. 265; 9 N. W. 764; Braught vs. Griffith, 16 Iowa 26; Smith vs. Latimer, 15 B. Mon. (Ky.) 75.

ing, will be subrogated to the 10 per cent. reservation in the contract as against a subsequent assignment of the reserved fund, and may maintain an action for its recovery.³³

§249. Surety paying judgment against the principal will be subrogated to the lien and other rights of the creditor under the judgment.

It has sometimes been considered that payment of a judgment, even by a surety, extinguishes it and that no remedy by subrogation to the judgment can be reserved to the surety, and that the relation of the surety to the principal after the payment of the judgment is that of an ordinary creditor. Such was the holding in England prior to the Mercantile Amendment Act.³⁴

³³ *Prairie State Bank vs. United States*, 164 U. S. 227; 17 S. Ct. 142. In this case the bank advanced money to the contractor to enable him to complete the building, and took an assignment of the reserve fund, and claimed an equitable lien on the same and asked to have such lien held superior to the surety's right of subrogation.

White, J.: "Under the principles thus governing subrogation, it is clear whilst Hitchcock was entitled to subrogation the bank was not. The former in making his payments discharged an obligation due by Sundberg for the performance of which he, Hitchcock, was bound under the obligation of his suretyship. The bank, on the contrary, was a mere volunteer, who lent money to Sundberg on the faith of a presumed agreement and of supposed rights acquired thereunder. The sole question, therefore, is whether the equitable lien, which the bank claims it has, without reference to the question of its subrogation, is paramount to the right of subro-

gation which unquestionably exists in favor of Hitchcock. In other words the rights of the parties depend upon whether Hitchcock's subrogation must be considered as arising from and relating back to the date of the original contract, or as taking its origin solely from the date of the advance by him.

Sundberg & Company could not transfer to the bank any greater rights in the fund than they themselves possessed. Their rights were subordinate to those of the United States and the sureties, depending, therefore, solely upon the rights claimed to have been derived in February, 1890, by express contract with Sundberg & Company, it necessarily results that the equity, if any, acquired by the Prairie Bank in the ten per cent. fund then in existence and thereafter to arise was subordinate to the equity which had, in May, 1888, arisen in favor of the surety Hitchcock."

³⁴ See Mercantile Amendment Act, Ante Sec. 244—note. *Dowbiggen vs. Bourne*, 2 Younge & Collier 462. In

If the payment of a specialty debt such as a note, bond or judgment makes of the surety a specialty creditor, he will thereby preserve to himself all the higher privileges, which attach to a specialty, among which are those arising from Statutes of Limitation wherein a longer period is given within which to commence an action, and in the case of judgments, the important remedy of reaching the property of the principal through the lien of the judgment. These are distinct advantages as compared with simple contract rights.

Furthermore if subrogation is to attach at all, in the case of

this case judgment was entered against the principal maker of a note, and subsequently this judgment was paid by the surety who brought an action to obtain an assignment to himself of the judgment against the principal, claiming a right of subrogation to this judgment. The decree for assignment was denied upon the ground that such an assignment would be wholly useless, since the judgment being paid, no execution could issue thereon, that the surety is only substituted to the rights of the creditor at the time of the substitution, and the creditor having no right of execution after payment by the surety, no such right could pass to the surety by subrogation.

The case of *Copis vs. Middleton*, Turn. & Russ. Ch. Rep. 224, arose upon a bond which the surety paid and sought subrogation to the rights of the creditor on the bond as a specialty, and it was held that the surety paying such obligation extinguished it, and that the surety became merely a simple contract creditor of the principal. The Lord Chancellor said: "It is a general rule that in equity a surety is entitled to the benefit of all the securities which the creditor has against the principal, but then the nature

of those securities must be considered; when there is a bond merely, if an action was brought upon the bond, it would appear upon oyer of the bond, that the debt was extinguished; the general rule therefore must be qualified, by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor; . . . I confess that I was astonished to hear that it had been decided, that when there was merely a bond, and payment of the bond, without more, the surety was to be considered as a specialty creditor." The doctrine of this case is now superseded by Statute in England and generally discredited in this country. But in reference to the case, Lord Brougham said in a later case (*Hodgson vs. Shaw*, 3 Mylne & K. 183, *ubi supra*): "The principles upon which *Copis vs. Middleton* rests are sound and unquestionable; and it is only upon a narrow and superficial view of the subject that the decision has ever been charged with refinement or subtlety. The ground of the determination was clear; it was founded upon the known rules of law, and determined in strict conformity with the doctrines of this Court."

a judgment lien, it would be of no value unless the right of the surety to subject the property dates from the time the lien first fastens upon the land, without regard to the time when the judgment was paid.

The hypothesis that the payment of the judgment by the surety cancels it, or at best substitutes the surety as a lienor from the date of the payment, is a refined technicality which wholly disregards the equity of the doctrine of subrogation and is no longer upheld by the courts.

The generally accepted view now is that where a judgment is paid by one who is collaterally liable as surety, whether the creditor has a joint judgment against the principal and surety, or separate judgment against them or a judgment against the principal only, the surety paying is subrogated to all the rights and liens of the creditor under the judgment with the same position of priority occupied by the creditor.³⁵

³⁵ *Lumpkin vs. Mills*, 4 Ga. 343; *Dempsey vs. Bush*, 18 O. S. 376; *Neal vs. Nash*, 23 O. S. 483; *Hill vs. King*, 48 O. S. 75; 26 N. E. 988.

Minshall, C. J.: "The rule is that so soon as the surety pays the debt of his principal there arises in his favor an equity to be subrogated to all the rights, remedies and securities of the creditor, and has the right to enforce them against the principal for the purpose of his indemnification. Whilst payment by the surety discharges the debt and extinguishes all the securities so far as concerns the creditor, such is not its effect as between the principal and the surety, and all who stand in the shoes of the former: as to these, it is in the nature of a purchase by the surety from the creditor, and operates as an assignment of the debt and securities to the surety. And, if a question is made whether the acts of the surety have been such as to keep the security on foot, the court, in the absence of evidence to the contrary, will presume that they were done with that intention which is most for the benefit of the party doing them."

The surety's right to reimbursement only arises upon his payment to the creditor. *Blanchard vs. Blanchard*, 201 N. Y. 134; 94 N. E. 630. By statute many states allow execution at law upon such a judg-

ment without requiring any decree of equity. *Kimmel vs. Lowe*, 28 Minn. 265; 9 N. W. 764; *Garvin vs. Garvin*, 27 S. C. 472; 4 S. E. 148; *Ezzard vs. Bell*, 100 Ga. 150; 28 S. E. 28. And a few courts permit this without a statute if the suretyship relation was established in the former action and the judgment has been assigned to the surety. *Nelson vs. Webster*, 72 Neb. 332; 100 N. W. 411; *Williams vs. Riehl*, 127 Cal. 365; 59 Pac. 762.

Benne vs. Schnecko, 100 Mo. 250; 13 S. W. 82; *Harper vs. Rosenberger*, 56 Mo. App. 388; *Canthorn vs. Berry*, 69 Mo. App. 404; *McNairy vs. Eastland*, 10 Yerg. (Tenn.) 310; *Swan vs. Smith*, 57 Miss. 548 (Statutory); *Bragg vs. Patterson*, 85 Ala. 233; 4 South 716 (Statutory); *Thomason vs. Wade*, 72 Ga. 160 (Statutory); *Hevener vs. Berry*, 17 W. Va. 474; *Dodd vs. Wilson*, 4 Del. Ch. 399; *Folsom vs. Carli*, 5 Minn. 333; *Schoonover vs. Allen*, 40 Ark. 132; *Connelly vs. Bourg*, 16 La. Ann. 108 (Statutory); *Potvin vs. Meyers*, 27 Neb. 749; 44 N. W. 25; *Gerber vs. Sharp*, 72 Ind. 553; *Brought vs. Griffith*, 16 Iowa 26; *Searing vs. Berry*, 58 Iowa 20; 11 N. W. 708; *Schleissman vs. Kalenberg*, 72 Iowa 338; 33 N. W. 459; *Edgerly vs. Emerson*, 23 N. H. 555; *Harris vs. Frank*, 29 Kan. 200 (Stat.

If the judgment of the creditor is against several co-sureties the surety paying will be subrogated to the rights of the creditor upon the judgment against the co-sureties.³⁰

utory); *Allen vs. Powell*, 108 Ill. 584; *Chandler vs. Higgins*, 109 Ill. 602; *Kinard vs. Baird*, 20 S. C. 377; *Sotheren vs. Reed*, 4 Harr. & J. (Md.) 307; *Gifford vs. Rising*, 12 N. Y. Supp. 430; *Hinckley vs. Kreitz*, 58 N. Y. 583; *Townsend vs. Whitney*, 75 N. Y. 425. *Earl, J.*: "Where one of two joint debtors, both of whom are principals, pays a joint judgment, the judgment becomes extinguished, whatever may have been the intention of the parties to the transaction; and it is not in their power, by any arrangement between them, to keep the judgment on foot, for the benefit of the party making the payment. The remedy of the party thus paying is by an action against his co-debtor for contribution. But a different rule prevails where one of the joint judgment debtors is a surety upon the obligation put into judgment. Under the civil law, a surety paying the joint obligation is entitled not only to be subrogated to all the securities which the creditor holds for the payment of the debt, but he is entitled to be substituted as to the very debt itself, to the creditor, by way of cession or assignment. It treats the transaction between the surety and the creditor, according to the presumed intention of the parties, to be not so much a payment as a sale of the debt."

Cotrell's Appeal, 23 Pa. 294.

Woodward, J.: "Subrogation is founded on principles of equity and benevolence.. and may be decreed where no contract or privity of any

kind exists between the parties. Wherever one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditor possessed against the debtor. Actual payment discharges a judgment or other encumbrance *at law*, but where justice requires it we keep it afoot in equity for the safety of the paying surety."

Appeal of Ward, 100 Pa. 289; *Boltz's Estate*, 133 Pa. 77, 19 Atl. 303; *Bankers' Surety Co. vs. Linder*, 137 N. W. 496; *George vs. Crim*, 66 S. E. 526; *Fidelity & Deposit Co. vs. Sausley*, 151 S. W. 353; *Smith vs. Davis*, 76 S. E. 670; *Burrus vs. Cook*, 93 S. W. 888.

Contra—*Foster vs. Trustees of Athenaeum*, 3 Ala. 302; *Adams vs. Drake*, 11 Cush. 504.

³⁰ *German American Savings Bank vs. Fritz*, 68 Wis. 390; 32 N. W. 123; *Furnold vs. Bank*, 44 Mo. 336; *Smith vs. Rumsey*, 33 Mich. 183; *Lidderdale vs. Robinson*, 2 Brock. 159.

Marshall, C. J.: "The cases suppose the surety to stand in the place of the creditor as completely as if the instrument had been transferred to him, or to a trustee for his use. Under this supposition, he would be at full liberty to proceed against every person bound by the instrument. Equity would undoubtedly restrain him from obtaining more from any individual than the just proportion of that individual; but to that extent, his claim upon his co-surety is precisely as valid as upon his principal."

§250. A suretyship promisor who pays will be subrogated to any mortgage security which the creditor holds for the debt.

Where a surety pays a debt for which the creditor holds a mortgage and the latter assigns the mortgage to the surety, the rights of the surety in the mortgage do not depend solely upon the application of the doctrine of subrogation, but the transaction is rather a purchase, and the rights of the surety, as an assignee of the mortgage, are unaffected by the fact that by operation of law he might have succeeded to the same interest in the mortgage without an assignment.

An assignment of a mortgage to a surety paying the debt is not necessary for his protection since he will be subrogated to the benefit of it by operation of law.³⁷

Subrogation to the position of the mortgagee gives to the surety the right to have foreclosure in his own name,³⁸ or to recover possession of personal property covered by the mortgage if the same has been transferred, or its value, if the transferee converts it.³⁹

The equity of the surety who pays the debt is superior to any subsequent claim of the creditor, and a cancellation of the mortgage by the creditor after payment, disregarding the equity of the surety, will not affect the right of subrogation, except as to innocent third persons whose claims thereafter attach.

³⁷ *Beaver vs. Slanker*, 94 Ill. 175, *Sheldon, J.*: "As a mere assignee alone of the mortgage, the complainant might not be able to sustain this decree in his favor, as the judgment for the mortgage debt was satisfied in full by the sale under execution of Kleinworth's land. But, upon the doctrine of subrogation, we think there is sufficient support for the decree. It is the undoubted principle of equity, that if, at the time when the obligation of the principal and surety is given, a mortgage also is made by the principal to the creditor, as an additional security for the debt, then, if the surety pays the debt, he will be entitled to have an

assignment of the mortgage and to stand in the place of the mortgagee, and that the mortgage will remain a valid and effectual security in favor of the surety for the purpose of obtaining his reimbursement, notwithstanding the obligation is paid. The mortgage is regarded as not only for the creditor's security, but for the surety's indemnity as well."

Murrell vs. Scott, 51 Tex. 520; *Nat. Bank vs. Cushing*, 53 Vt. 321; *O'Hara vs. Haas*, 46 Miss. 374.

³⁸ *McLean vs. Towle*, 3 Sand. Ch. 118; *Jacques vs. Fackney*, 64 Ill. 87; *Gossin vs. Brown*, 11 Pa. 527.

³⁹ *Lewis vs. Palmer*, 28 N. Y. 271.

Thus where the creditor on receipt of payment from the surety entered a satisfaction of the mortgage on the records and thereafter acquired a judgment lien on the land, it was held that the equity of the surety was superior to the judgment lien.⁴⁰

The question has been somewhat mooted as to whether a subsequent advancement by the creditor, for which the surety has not made himself liable, may be tacked to the mortgage and be preferred as a claim upon the property as against the surety's equity of subrogation. In other words, whether the surety must also pay the additional debt in order to have the benefit of the mortgage as to the original debt.

The English judges have disagreed upon this point. The Master of Rolls, Sir John Romilly, to whose opinions great deference is shown, is credited with the view that the right of the surety to stand in the place of the mortgagee is subject to the right of the mortgagee to make further advances to the mortgagor, and take further security on his land, and that his lien for the additional charges is superior to the mere equity of subrogation which accrues to the surety.

The rule stated by him was that the surety paying the debt is entitled to subrogation to the securities "provided the creditor has no lien upon them, or right to make them available against the principal debtor, to enforce the payment of a debt different from that which the surety has paid. But if the creditor has such a right, *and one arising out of the transaction itself*, of which the suretyship forms a part, then the right of the surety to the benefit of the securities is subordinate to the right of the creditor to make them available for the payment of his other claims, and can only be made available after the paramount right is satisfied."⁴¹

⁴⁰ City Nat. Bank vs. Dudgeon, 65 Ill. 11.

⁴¹ Farebrother vs. Wodehouse, 23 Beav. 18. The facts in this case were that two mortgages were given at the same time; one for £2,000, and one for £3,000. The surety engaged

for the first sum but not for the other, and it was held that, the surety must pay the whole sum of £5,000 before he could be subrogated to the mortgage. There is a distinction to be made between additional advancements as a part of the same transac-

It was later held in England that "The surety is entitled to have all the securities preserved for him, which were taken at the time of the suretyship, or, as I think it is now settled, subsequently. Nor does it matter at all in principle, whether the creditor takes a further security for further advances made prior to the time when the surety makes payment of the debt. They can have nothing to do with the surety. He is entitled to the benefit of the securities, though his payment be not made until after the time when the further advances were made by the creditor. The principle is that the surety in effect bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment, and it is the duty of the creditor to keep the securities intact; not to give them up or to burthen them with further advances." ⁴²

The rule as to tacking upon a secured claim, the subsequent advancement of a creditor is the same in principle whether the security is a mortgage or personal collaterals and the generally accepted doctrine in this country is that the equity of the surety attaches to the collaterals as soon as the suretyship contract is

tion, and subsequent advancements made after the rights of the parties are fixed.

But see *Williams vs. Owen*, 13 Simons, 597. Where the advancements were made as a separate transaction and subsequent to the suretyship contract, and it was held that the surety must pay the subsequent liens before exercising his right of subrogation.

See also *Grubbs vs. Wysors*, 32 Gratt. 127. The facts of this case seem to be parallel with those upon which Sir John Romilly based his opinion, as quoted in the text. The creditor had security for the entire debt and for a part of it had the personal obligation of a surety. The debt in its entirety arose out of the same transaction and was not as in *Williams vs. Owen* (ubi supra) made up in part of subsequent ad-

vancements. The creditor sold land, to be paid for in three installments, reserving title as security, and the surety engaged for the first installment, and upon the payment of this installment claimed subrogation to the vendor's lien, and the Court said, "This cannot be equity. The surety will be permitted to occupy the place of the creditor, when the latter no longer has occasion to hold it for his own protection, but equity will never displace him, to his prejudice, merely to give the surety a better footing."

See also *Rice vs. Morris*, 82 Ind. 204.

⁴² *Forbes vs. Jackson*, 19 Ch. Div. 615 (1882).

See also *Bowker vs. Bull*, 1 Sim. (N. S.) 29; *Drew vs. Lockett*, 32 Beav. 499.

made, and this equity cannot be displaced so as to apply the securities to subsequent advancements until the surety has first been indemnified.⁴³

§251. Subrogation applies to one in the situation of a surety.

One to whom the privileges of suretyship are extended by operation of law is clothed with all the benefits of the relationship

⁴³ Nat. Exchange Bank vs. Silliman, 65 N. Y. 475. *Dwight, C.*: "The only doubt that can arise in the case at bar is, whether the defendants can insist on a priority of application of the proceeds of the collaterals, or whether they are only entitled to share in them, *pari passu*, with the plaintiff. I think that the presumption is, that the equity of a surety attaches to the trust fund as soon as the trust relation is created, and the burden of proof is on any one who asserts the contrary to establish it. Undoubtedly an arrangement might be made whereby the right of subrogation might be qualified or modified by agreement, so that subsequent sureties, on wholly different and later claims, might participate in the benefit of collateral securities. This would not be the ordinary rule, and some evidence would be required to establish its existence in a particular case. The same rule must be applied to a creditor making subsequent advances to the debtor who deposited the collaterals; while as between him and the debtor, they might be applied to all claims ratably; yet as to the surety, they could not be, unless he knew, or had reason to know, that such was the fair intent of the transaction. The ordinary interpretation of the dealings of the parties would be, that the surety, when he undertook his

liability, acquired, in equity, a lien upon the fund, which the creditor could not displace. . . . It is not necessary to contend that these rules would be applicable if the collaterals were deposited as security for one transaction consisting of several parts or branches. In that case it may be that there are no superior equities, and that the collaterals must be applied to the entire indebtedness. This was so held in *Farebrother vs. Wodehouse* (23 Beav. 18). This case was placed distinctly on the ground that at the very time the surety entered into his obligation, there was a loan of two sums by the same creditor to the same debtor, of which the surety was made aware. The case at bar would resemble it if it should be supposed that a number of notes were discounted at one time, and on one of them there was an indorser, and on others none, and the indorser knew all the facts; even then the doctrine of tacking would need to be invoked to shut out the surety. Whether that could be applied in our law, I need not consider. What now is claimed is, that the rule of priority must prevail where the transactions are distinct and unconnected, and that where they are apparently separate, the burden of proof is on the creditor to show their connection and thus to overcome the rule of priority."

the same as if a special undertaking had been entered into to pay the debt of another.

Thus where a retiring partner is called upon to pay a firm debt, which by agreement between himself and partner should have been paid by the latter. The retiring partner who thus pays is in the situation of a surety and will be subrogated to all the securities and remedies of the creditor.⁴⁴ Or where a judgment is a lien upon two pieces of land and the owner conveys one of them, the vendee is in the situation of a surety, and to the extent of the judgment which he is required to pay may be subrogated to the remedies of the creditor, and enforce the lien against the remaining piece of land.⁴⁵

The same principle is involved where land is sold subject to a mortgage which the purchaser assumes and agrees to pay, the vendor remains liable for the debt, but is in the situation of a surety, and if he pays he will be subrogated to the mortgage and may have foreclosure for his own benefit.⁴⁶

A regular indorser of a bill or note is in the situation of a surety, and as to him all prior parties are principal obligors, and upon payment, either voluntarily or otherwise, he is entitled to subrogation to all the remedies of the holder against the maker or other prior parties, and to have recourse to all securities in the possession of the holder which belong either to the maker or the intervening indorsers.

It was held that an indorser paying was entitled to be subrogated to the right of the holder to have execution against the person of the principal debtor.⁴⁷

Where the maker of a note executes a mortgage, or pledges collateral for its security, the indorser who pays the note is en-

⁴⁴ *Conwell vs. McCowan*, 81 Ill. 285; *Shinn vs. Shinn*, 91 Ill. 477; *Chandler vs. Higgins*, 109 Ill. 602; *Ætna Ins. Co. vs. Wires*, 28 Vt. 93; *Scott's Appeal*, 88 Pa. 173; *Laylin vs. Knox*, 41 Mich. 40; 1 N. W. 913; *Swan vs. Smith*, 57 Miss. 548.

⁴⁶ *Lowry vs. McKinney*, 68 Pa. 294.

⁴⁵ *Marsh vs. Pike*, 10 Paige Ch. 595; *Johnson vs. Zink*, 51 N. Y. 333; *Ayres vs. Dixon*, 78 N. Y. 318; *Orrick vs. Durham*, 79 Mo. 174; *Brown vs. Kirk*, 20 Mo. App. 525.

⁴⁷ *Woodward vs. Pell*, L. R. 4. Q. B. 55.

titled to be subrogated to the rights of the holder in the mortgage and collateral.⁴⁸

Where a wife joins in a mortgage on lands of her husband, for the purpose of relinquishing dower, and thereafter redeems the land from the mortgage with her own funds, she will be subrogated to the lien and priority of the mortgage.⁴⁹

It is held that where a wife pays a mortgage, executed by herself and husband, upon land in which she has a life interest, that she will be subrogated to the rights of the mortgagee to the amount of her payment.⁵⁰ In a case where two persons were jointly liable for a debt, and as to each other were co-debtors, it was held that the one paying the debt is in the situation of a surety and entitled to be subrogated to the rights of the creditor against his co-debtor.⁵¹

⁴⁸ *Bridgman vs. Johnson*, 44 Mich. 491; 7 N. W. 83; *Seixas vs. Gonsoulin*, 40 La. Ann. 351; 4 South. 453; *Beckwith vs. Webber*, 78 Mich. 390; 44 N. W. 330; *O'Hara vs. Haas*, 46 Miss. 374; *Yates vs. Mead*, 68 Miss. 787; 10 South. 75.

Contra—*Applewhite vs. Shaw*, 4 Humph. (Tenn.) 93.

It is held that an accommodation-acceptor of a bill, while a principal debtor as to the holder, is a mere surety as to the drawer, and is entitled to subrogation to the securities of the drawer in the hands of the holder. *Toronto Bank vs. Hunter*, 4 Bosw. (N. Y.) 646.

⁴⁹ *Jefferson vs. Edrington*, 53 Ark. 545; 14 S. W. 903; *Fitcher vs. Griffiths*, 103 N. E. 471.

⁵⁰ *Ohmer vs. Boyer*, 89 Ala. 273; 7 South. 663.

⁵¹ *Greenlaw vs. Pettit*, 87 Tenn. 467; 11 S. W. 357; *The Hattie M. Spraker*, 29 Fed. Rep. 457. In this case a vessel was damaged by the common fault of two other vessels, and one of the vessels liable paid the entire claim, and it was held that it was subrogated to the rights

of the damaged vessel against the other wrongdoer.

See also *Baltimore & Ohio R. R. Co. vs. Walker*, 45 O. S. 577; 16 N. E. 475. In this case two railroads crossing each other at grade were required by law to keep the crossing in a condition prescribed by statute, and maintain a watchman at the junction. One of the railroads made the repairs and paid all the expenses chargeable by law against both, and brought this action against the other to recover back one-half. The defendant contended that the payment was voluntary and raised no implied promise to contribute. But the court applied the rule of subrogation, holding that the performance of a joint duty by one co-obligor gives to him the same right to recover from the other which was originally vested in the creditor party.

A co-obligor paying the joint obligation will be subrogated to the securities deposited with the creditor by the other joint debtor. *Vincent vs. Logsdon*, 17 Oregon 284; 20 Pac. 429; *McCready vs. Van Antwerp*, 24 Hun 322.

§252. Surety who pays the debt is entitled to be subrogated to a pro rata share of any dividend which is derived from the assets of the principal.

If the assets of the principal are administered by proceedings in insolvency, the dividends distributed belong equally to all creditors of the same class, and where certain debts are secured by the obligations of third parties, the dividend is applicable to each and every part of the secured debt, and if the debt exceeds the limit of the liability of the surety, the latter, if he pays his obligation, is entitled to receive by way of subrogation, such proportion of the dividend as the amount of his payment bears to the entire debt.

Thus a letter of guaranty bound the guarantor to an amount not exceeding £400, but the advancements made to the principal amounted to £625. The assets of the principal were administered through insolvency proceedings and the question arising was, whether the dividends should be applied wholly in the reduction of the larger sum, and the balance, up to the limit of the letter of credit to be paid by the guarantor, or whether a pro rata share of the dividend should be applied in reduction of that part of the debt covered by the guaranty, and the guarantor held for the balance, and it was held, "If the whole amount of the debt from M— had not exceeded the £400, it is clear that the defendant would have received the full benefit of the dividend of 8s. 7d. in the pound, as he could not have been answerable under the guaranty for more than the remainder, after the deduction of such dividend; and although the amount of the debt does in this case exceed the £400, and thereby the position of the creditor is so far altered, that one part of the debt, viz., to the extent of £400, is guaranteed, and the remainder not, still there seems no reason why the application of a payment of so much in the pound upon the whole debt should in any way be affected by the collateral circumstance of the guaranty; or why such payment should not be applicable as well to the £400 guaranteed as to the part uncovered by the guaranty."⁵²

⁵² *Bardwell vs. Lydall*, 7 Bing. 489.

See also *Gray vs. Seckham*, L. R. 7 Ch. App. 680.

A similar question also arises in bankruptcy proceedings where the claim is in part secured by a surety, and where the holder of the claim has been paid such part, as to whether he may prove the entire claim, and have the dividends upon it applied in reduction of the balance due, or whether he may only prove for the unpaid part with a corresponding reduction in the amount of his dividend.

The right of the surety to insist upon the entire claim being proved seems clear, for if under these circumstances the dividend is augmented so that together with what the surety has paid the sum exceeds the debt, the surplus would belong to the surety by the application of the doctrine of subrogation.⁵³

Again where two persons were co-sureties, and one having died the survivor paid the entire demand and presented a claim against the estate of the deceased co-obligor for the full amount paid, it was contended by the estate that the claimant should not be permitted to prove against the estate of his co-surety for the whole debt, when his co-surety only owed him one-half of the debt, but it was held that since each surety was bound *in solido* to their common creditor for the entire amount of the debt, that either surety paying would be subrogated to the claim of the creditor for the entire debt against the other, and that the survivor might assert the same claim against the estate of the decedent as the creditor himself could have done, and was entitled to receive dividends until reimbursed the full contributory share due him as co-surety.⁵⁴

The National Bankruptcy Act of 1898 provides in Sec. 57i, "Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."

It is held that where the creditor could not prove his claim without

first surrendering a preference as required by the Bankruptcy Act, that the surety or guarantor is subject to the same condition and must also pay in the amount of such preference before he can be subrogated. *In re Schmechel Cloak & Suit Co.*, 3 Nat. B. News. 110.

⁵³ *In re Baxter & Ralston*, 18 N. B. R. 497.

⁵⁴ *Pace vs. Pace*, 95 Va. 792; 30 S. E. 361.

See also *Hess's Estate*, 69 Pa. 272.

It is held that where an insolvent dies, or his assets are administered through insolvency proceedings, and a creditor holds collateral security for his debt, upon which he realizes less than the amount of the debt, that he may prove his entire claim against the estate of the decedent or insolvent, and make no account of the collateral until he is paid in full.⁵⁵ Such right in

But see *New Bedford Institution for Savings vs. Hathaway*, 134 Mass. 69.

⁵⁵ *Merrill vs. National Bank of Jacksonville*, 173 U. S. 131; *Chemical Bank vs. Armstrong*, 59 Fed. Rep. 372. *Taft, J.*: "In *Massachusetts (Amory vs. Francis*, 16 Mass. 309), in *Iowa (Wurtz vs. Hart*, 13 Iowa 515), in *South Carolina (Wheat vs. Dingle*, 32 S. C. 473; 11 S. E. 394), and in *Washington (In re Trasch*, 31 Pac. 755), it was held that the rule in equity is the same as the rule in bankruptcy, and that the secured creditor can prove only for the balance of his debt after the collateral shall have been applied. It was so held by Sir John Leach, master of the rolls, in *Greenwood vs. Taylor*, 1 Russ. & M. 185. In *Amory vs. Francis*, supra, Chief Justice Parker repudiates the view that the secured creditor should be allowed to prove for his full claim, without deduction for collateral, on the ground that he 'would in fact have a greater security than that pledge was intended to give him; for, originally, it would have been security only for a proportion of the debt equal to its value; when, by proving the whole debt, and holding the pledge for the balance, it becomes security for as much more than its value as is the dividend which may be received on the whole debt.' With much deference to the great jurist who advanced this argument, we think that it quite incorrectly states the effect

of the contract of pledge, which is that the collateral shall be security for the whole debt, and every part of it, and therefore is as applicable to any balance which remains after payments from other sources as to the original amount due. The view of the supreme judicial court of Massachusetts was adopted into a statute which deprives the subsequent cases in that state of much bearing upon the question before us. The other cases cited, and especially *Greenwood v. Taylor*, seem to rest on the rule in equity requiring a creditor with two funds as security, one of which he shares with others, to exhaust his sole security first. As already said, the rule has no application when its operation would prevent the creditor from paying his whole claim.

"The great weight of authority in England and this country is strongly opposed to the view that a creditor with collateral shall be thereby deprived of the right to prove for his full claim against an insolvent estate. *Greenwood v. Taylor* was questioned by Lord Cottenham in *Mason v. Bogg*, 2 Mylne & C. 443. 448, and was expressly repudiated as authority in the court of chancery appeals in *Kellock's Case*, 3 Ch. App. 769,—a case which, upon this point, is cited with approval in *Lewis v. U. S.*, 92 U. S. 618. In this country, the Massachusetts doctrine was dis-sented from by the Supreme Court of

the creditor carries a corresponding right to a surety in the application of the doctrine of subrogation.

§253. Subrogation among co-sureties.

No one of several sureties for the same debt is entitled to any advantage over his co-sureties in the application of the property of the principal for their indemnity, and the principal has not the right to apply his assets to the security of one in preference to another.

If the principal has executed a mortgage to one co-surety, or deposited collateral with him, or in any other way secured him out of his own property, and another co-surety pays the debt, he is entitled to subrogation to the benefit of such security as indemnity against the common burden.⁵⁶

A surety who has indemnity out of the property of the principal, is, to the extent of such security, a trustee for his co-surety. The taking of such indemnity from the principal lessens his

New Hampshire in the early case of *Moses vs. Ranlet*, 2 N. H. 488. Other cases which fully support the views we have expressed are: *People vs. E. Remington & Sons*, 121 N. Y. 336; 24 N. E. 793; *In re Bates*, 118 Ill. 524; 9 N. E. 257; *Findlay vs. Hosmer*, 2 Conn. 350; *Logan vs. Anderson*, 18 B. Mon. (Ky.) 114; *Bank vs. Patterson*, 78 Ky. 291; *Brown vs. Bank*, 79 N. C. 244; *Kellogg vs. Miller*, 22 Or. 406; 30 Pac. 229; *Miller's Estate*, 82 Pa. St. 113; *Graeff's Appeal*, 79 Pa. St. 146; *Patten's Appeal*, 45 Pa. St. 151; *Miller's Appeal*, 35 Pa. St. 481; *Allen vs. Danielson*, 15 R. I. 480, 8 Atl. 705; *Bank vs. Haug*, 82 Mich. 607, 47 N. W. 33; *West vs. Bank*, 19 Vt. 403. Compare, also, *Kortlander vs. Elston*, 2 C. C. A. 657, 52 Fed. 180; *Bank Cases*, 92 Tenn. 437, 21 S. W. 1070.

"The exact point which is common to all the foregoing authorities, and which they all sustain, is that a creditor who has proved his claim against an insolvent estate under administration can collect his dividends without any deduction from

his claim as proven for collections made from collateral after his proof of claim is filed." But see *Westinghouse Electric & Mfg. Co. vs. R. Co.*, 228 Fed. 978.

⁵⁶ *Lidderdale vs. Robinson*, 2 Brock. 159; *Shaeffer vs. Clendenin*, 100 Pa. 565; *Nally vs. Long*, 56 Md. 567; *Fishback vs. Weaver*, 34 Ark. 569; *Hartwell vs. Whitman*, 36 Ala. 712; *Scribner vs. Adams*, 73 Me. 541; *Fuller vs. Hapgood*, 39 Vt. 617; *Reinhart vs. Johnson*, 62 Iowa 155; 17 N. W. 452; *Neely vs. Bee*, 32 W. Va. 519; 9 S. E. 898; *People's Bank vs. Miller*, 85 Kan. 272; 116 Pac. 884.

But see *Assets Realization Co. vs. American Bonding Co. et al.*, 88 O. S. 216; 102 N. E. 719; holding that where several sureties are bound by separate instruments on account of the same principal with limited liability as to each, the relation of co-surety does not exist and on this account collateral deposited with one does not inure to the benefit of the others.

See also *German Amer. Savings Bank vs. Fritz*, 68 Wis. 390; 32 N. W. 123.

ability to pay, and it would be a fraud upon his co-sureties to permit him to convert it to his sole use.⁵⁷

If the indemnity comes from a third person, as where the wife of the principal executes an indemnity mortgage on her separate property to one surety, the rule does not apply, and such indemnity need not be shared with the other sureties.⁵⁸

§254. Subrogation between successive sureties.

Successive sureties for the same principal are sometimes co-sureties, but more often one or more are sureties for the others. An example of the former is where a public officer is required to give additional bond during his term of office, such last bond being cumulative establishes the relation of co-sureties between ✓ the successive promisors.⁵⁹

The execution of a suretyship obligation in the course of a legal proceeding for the collection of a debt for which another is already bound as a surety, or where bonds are given in the prosecution of legal remedies in the Appellate Courts in which successive undertakings are required, generally results in placing the ultimate liability upon the last surety, through whose agency the litigation has been prolonged, and while as between such surety and the creditor he may be properly termed a surety for the prior promisor, yet if his contract is solely in the interest of the principal, and without the assent of the prior surety, he is regarded as debtor of all the prior parties, and not entitled to subrogation to the remedies of the creditor against the prior sureties; but on the contrary if the prior surety pays he will recover by subrogation from the later surety.

⁵⁷ *Carpenter vs. Kelly*, 9 O. 106.

Lane, C. J.: "A surety is not bound by law to seek indemnity; yet if the means of indemnity are placed in his hands, and he undertakes to retain them, he becomes a trustee for his co-sureties, because they inure to their common benefit, and he is bound by the obligations which attach to a trustee to use honesty, good faith, and due discretion,

in their management. He may not abandon them without cause, nor negligently omit the steps necessary to render them available."

See also *Sanders vs. Weelburg*, 107 Ind. 266; 7 N. E. 593; *Owen vs. McGehee*, 61 Ala. 440; *National Bank of Commerce vs. Schirm*, 3 Cal. App. 696; 86 Pac. 981; *Baber vs. Hanie*, 80 S. E. 57.

⁵⁸ *Leggett vs. McClelland*, 39 O. S. 624.

⁵⁹ *Ante* Sec. 158.

It is said, "We know of no case in which, on the ground either of contribution among co-sureties or of substitution to the securities of the creditor, a subsequent surety coming in aid of the debtor alone, without the request or concurrence of the original sureties, and in the regular course of the remedy for coercing the debt from him alone, or for the purpose of obstructing its collection by his own separate proceeding and for his own benefit, has obtained in equity either partial or full reimbursement from the prior sureties. The doctrine established by the adjudged cases, and as we think, in conformity with the true principles of equity, is that, if under such circumstances, the prior surety is compelled to pay the debts, he thereby becomes entitled by substitution to the rights of the creditor against the subsequent surety to the whole extent of the payment made and of the obligation of the subsequent surety; which precludes all right on the part of the subsequent surety, should the debt be coerced from him, to claim reimbursement from the prior surety."⁶⁰

This rule is usually put upon the ground that the successive surety by prolonging the litigation makes himself an obstacle to the prior promisor by preventing an adjustment of the controversy, wherein the prior surety might have had immediate subrogation to the rights of the creditor against the principal, and this conclusion seems to be reached without requiring any showing that the prior surety has in fact been injured.⁶¹

⁶⁰ *Brandenburg vs. Flynn*, 12 B. Mon. (Ky.) 397.

⁶¹ *Ante* Sec. 246.

Fitzpatrick's Admr. vs. Hill, 9 Ala. 783; *Dent vs. Wait*, 9 W. Va. 41; *Kellar vs. Williams*, 10 Bush (Ky.) 217; *Winchester vs. Beardin*, 10 Humph. (Tenn.) 247; *Moore vs. Lassiter*, 16 Lea (Tenn.) 630; *Pier-son vs. Catlin*, 18 Vt. 77; *Fletcher vs. Menken*, 37 Ark. 206; *McCor-mick vs. Irwin*, 35 Fed. 111.

Opp vs. Ward, 125 Ind. 241; 24 N. E. 974. In this case the

first suretyship was that of a guaranty upon a lease, and the second was an appeal from a judgment against the lessee for rent. The Court applies the rule and urges two grounds, first, that of a possible injury to the guarantor by reason of the stay of execution, and second, a somewhat novel and exceedingly doubtful ground that the last surety is a "volunteer" and so not entitled to subrogation.

Mitchell, J.: "The application of the doctrine of subrogation requires

There would seem to be some equity in treating successive sureties as co-sureties in all cases where the prolongation of the litigation in good faith results in no loss to the prior surety.

(1) that a person must have paid a debt due to a third person, for the payment of which another was in equity primarily liable; and (2) that in paying the debt the person paying acted under the compulsion of saving himself from loss, and not as a mere volunteer. . . . It is insisted, however, that in the case of successive sureties, who become bound by separate obligations for the payment of the same debt, the equity of the last surety is superior to that of the first, and that as the liability of the plaintiff below, as guarantor, was prior in point of time to that of the appellant as surety on the appeal bond, both being bound for the same debt, the equity of the latter was at least equal, if not superior, to that of the former. This view is not maintainable in a case like the one under consideration. It is quite true the plaintiff below became liable, as guarantor, for the payment of all rent, as well as for all damages growing out of the unlawful detention of the property of the tenant. But it is also true that his liability, which was theretofore uncertain and contingent, became certain and fixed when the landlord recovered judgment for the possession of the leased premises, and for damages for their unlawful detention. The guarantor had the right to pay the amount of the judgment recovered against his principal, and thus put an end to his liability at once.

"By the voluntary intervention of the appellant, in becoming surety in the appeal bond, all further proceed-

ings on the judgment by which the landlord was awarded the right of immediate possession, were stayed, and the hands of the guarantor were effectually tied until the appeal was disposed of. . . . Upon the determination of the appeal, the landlord had his election to sue on the appeal bond and recover the rental value of the premises unlawfully detained, or to proceed against the guarantor on the lease. He adopted the latter alternative. If he had sued on the appeal bond and recovered judgment against the surety, it is quite certain that the latter would have had no standing in a court of equity to recover from the guarantor. *This is so because he occupies the position of a volunteer*, and as is pertinently said in *Acer vs. Hotchkiss*, supra [97 N. Y. 395]: 'One who is only a volunteer cannot invoke the aid of subrogation, for such person can establish no equity.' *Gans vs. Thieme*, 93 N. Y. 225. *Having intervened as a volunteer* and by his interposition stayed proceedings on the judgment for possession to the prejudice of the guarantor, whose liability had become fixed and at an end, so far as respects future rents, it must be considered in equity that he did so upon the condition that he would take the place of the guarantor from that time forward."

The surety on the appeal bond in this case was not a "volunteer" and the doctrine of the New York cases cited has no application to the facts of this case.

An earlier case in Indiana seems

Without the intervention of the later surety, the earlier promisor might be required to pay and suffer great loss and there is no equity under these circumstances in granting his exoneration

opposed to the view stated in the case last cited. *Kane vs. The State ex rel. Woods*, 78 Ind. 103.

In this case a license bond was given by one engaged in selling intoxicating liquors, conditioned to pay any judgment that might be entered for fines assessed against the principal for violation of the act regulating the sale of liquor. A judgment was rendered upon which stay of execution was allowed by the giving of a bond as provided by law; the sureties upon the stay bond being required to pay, bring action against the sureties of the license bond, claiming subrogation to the position of the state on that bond, and it was held, "The appellee's relator having become, in due course of law and at the request of said Collins, his replevin bail for the payment of the judgments rendered for said fines and costs, and having been compelled to pay and having paid, as such replevin bail, the said several judgments for said fines and costs, we know of no possible reason why the relator should not be permitted to avail himself of the equitable doctrine of subrogation, and should not be subrogated to all the rights of the State of Indiana, the judgment creditor, in the bond primarily given by the said Collins to secure the payment of all fines and costs that might be assessed against him."

It would seem that in Virginia neither one of successive sureties is entitled to subrogation against the other. That the last cannot recover from the first was held in *Sherman's Admr. vs. Shaver*, 75 Va. 1, where,

although not strictly necessary to the decision of the case, it was said, "If an execution against principal and surety be levied on property of the principal, and a third person, at the request of the principal but without the consent or concurrence of the surety, intervene and bind himself as surety in a bond for the forthcoming of the property on the day of sale and the bond be forfeited, although such third person thus becomes bound as surety for the debt, yet he is not entitled on making payment to be substituted for contribution to the original judgment against the original surety, because by his intromission the property of the principal has been withdrawn from the levy and restored to the debtor instead of being applied, as it otherwise would have been, to the payment of the debt, and thereby the original surety has been injured, and the second surety whose intervention has caused the injury has no equity to substitution for indemnity or contribution against the first. The same principle applies to sureties on appeal bonds, bail bonds, injunction bonds, stay bonds, prison-bonds and the like obligations." It appears also to be the rule in Virginia that the earlier bond cannot be subrogated to the subsequent bonds.

Rosenbaum vs. Goodman, 78 Va. 121. In this case a replevin bond was executed and judgment was rendered against the plaintiff who appealed with new sureties to the United States Circuit Court of Appeals, and judgment being affirmed, again

merely because the right to require payment of the first surety is deferred, especially since a re-hearing in an Appellate Court might result in his complete exoneration.

The equity suggested has been recognized in cases where the first surety consents to the stay of execution.⁶²

appealed to the United States Supreme Court. Recovery having been had against the original sureties on the replevin bond it was held that those sureties were not subrogated to the rights of the creditor against the subsequent sureties on appeal.

⁶² *Hartwell vs. Smith*, 15 O. S. 200. In this case a bond was given to discharge attachment, and judgment being rendered in favor of the attaching plaintiff, error was prosecuted on the judgment with additional surety, the first surety consenting.

Scott, J. "In regard to this question of superiority of equities, which is liable to arise in the case of prior and subsequent bonds, executed by different sureties, for distinct purposes, and both constituting securities in the hands of the creditor for the same debt, it is well settled that if the interposition of the second surety, is for the benefit of the principal alone, without the sanction or assent of the first surety, who may be prejudiced thereby; as when the effect of the second bond is to prevent the enforcement of present payment from the principal, and thus to prolong the responsibility of the first surety; in such a case the equity of the first surety is superior, and he is entitled to be subrogated to the rights of the creditor as against the second. And this doctrine seems to be entirely equitable, for it is but reasonable that the ben-

efit intended for the principal alone, by the second surety, should be conferred, if at all, at his own risk, and not at the risk or to the prejudice of other parties whose wishes were not consulted in the transaction.

"But the rule is otherwise, where the surety in the second bond becomes bound for a purpose in which both the principal and the prior surety concur, in which they both have an interest, and where the assent of the prior surety is expressly given, or is clearly to be inferred from the circumstances of the case. In such a case the last surety has a right to look for his indemnity, not only to his principal, but to such fixed securities as had been given to the creditor, when his engagement was entered into, and in the faith of which he may be presumed to have incurred his obligation. . . . By the execution of the first bond, Smith procured for his principal the discharge of the order of attachment. The creditor was thus prevented from securing his claim by a levy upon his debtor's property; the bond of Smith being substituted for such security. By the subsequent judgment against the debtor this security became fixed. It was for the interest of Smith, as well as for that of his principal that this judgment should be reversed."

See also *Monson vs. Drakely*, 40 Conn. 552.

§255. Subrogation in favor of the creditor to securities held by the surety.

If the surety holds property of the principal, or has a lien upon the property of the principal as his indemnity against loss by reason of his suretyship, the creditor may resort to such property or lien and subject it to the payment of his debt.

This form of subrogation is available to the creditor without any previous agreement giving to the creditor this benefit, and, as in the case of subrogation by a surety, it rests upon the consideration that any property of the principal that has been specifically charged with the payment of a debt, ought not to be used in any other way until that purpose has been accomplished.⁶³

The creditor will be subrogated notwithstanding the surety is discharged by reason of some act of the creditor, or by the operation of the Statute of Limitations.⁶⁴

⁶³ *Curtis vs. Tyler*, 9 Paige 432; *Owens vs. Miller*, 29 Md. 144; *Barton vs. Croydon*, 63 N. H. 417; *Loehr vs. Colborn*, 92 Ind. 24; *Seibert vs. True*, 8 Kas. 52; *Pendery vs. Allen*, 50 O. S. 120; 38 N. E. 24; *Coons vs. Clifford*, 58 O. S. 480; 51 N. E. 39; *Union Nat. Bank vs. Rich*, 106 Mich. 319; 64 N. W. 339; *First Nat. Bank vs. Wheeler*, 12 Tex. Civ. App. 489; 33 S. W. 1093; *New London Bank vs. Lee*, 11 Conn. 112; *Stearns vs. Bates*, 46 Conn. 306; *Alabama Ins. Co. vs. Anderson*, 67 Ala. 425; *Saf-fold vs. Wade*, 51 Ala. 214; *Cooper vs. Middleton*, 94 N. C. 86; *Pratt vs. Thornton*, 28 Me. 355; *Steward vs. Weleh*, 84 Me. 308; 24 Atl. 860; *Price vs. Trusdell*, 28 N. J. Eq. 200; *Demott vs. Stockton*, 32 N. Y. Eq. 124; *Tompkins vs. Catawba Mills*, 82 Fed. Rep. 780; *Kelly vs. Herrick*, 131 Mass. 373; *Mifflin's Appeal*, 98 Pa. 150; *Griffis vs. First National Bank*, 79 N. E. 230; *People vs. Metropolitan Surety Co.*, 132 N. Y. S. 829; 98 N. E. 412; *Keller vs. Ashford*, 133 U. S. 610; *Chambers vs. Prewett*, 172 Ill. 615; 50 N. E. 145.

Vail vs. Foster, 4 N. Y. 312. "It is a settled rule in equity, that the creditor shall have the benefit of any counter bonds or collateral securities which the principal debtor has given to the surety, or person standing in the situation of a surety, for his indemnity. Such securities are regarded as trusts for the better security of the debt, and chancery will compel the execution of the trusts for the benefit of the creditor."

See also *Nat. Bank vs. Bigler*, 83 N. Y. 51.

⁶⁴ *Helm's Admr. vs. Young*, 9 B. Mon. (Ky.) 394; *Eastman vs. Foster*, 8 Met. 19; *Cowan vs. Telford*, 5 Lea (Tenn.) 449; *Long vs. Miller*, 93 N. C. 227. In *Jack vs. Morrison*, 48 Pa. 113, the surety was not liable because his promise was verbal and so void under the statute of frauds, but it was held that the creditor was subrogated nevertheless to the securities deposited with the surety for his indemnity.

Where the principal executes a mortgage to the surety, which is of record, the creditor's rights, as against subsequent incumbrances, will attach as of the date of the mortgage.⁶⁵ And if the surety himself becomes the purchaser of the land upon which his indemnity mortgage rests, it will not operate as a merger of the mortgage as against the creditor.⁶⁶

A conveyance of land encumbered by an indemnity mortgage to a bona fide purchaser without notice actual or constructive will defeat the trust in favor of the creditor.⁶⁷

It is held that where the surety holds a mortgage to indemnify him in his suretyship and also to secure a debt owing him by the principal, that the creditor will have priority in the proceeds of the mortgage, on the ground that as trustee of the property of the principal, the surety can not under the ordinary rule of trusts, derive any benefit from the transaction until the trust is fully executed.⁶⁸

⁶⁵ *Ijames vs. Gaither*, 93 N. C. 358; *Carlisle vs. Wilkins*, 51 Ala. 371.

In *Grant vs. Ludlow*, 8 O. S. 1, an agent L. was intrusted with the duty of taking security for the advancements of his principals G. & S. to a customer, and for that purpose took a mortgage which he afterwards cancelled without his principals' consent; thereafter he executed a written guaranty to his principals in satisfaction of the claims against him for his misconduct as agent in releasing the securities, and the customer executed a mortgage to the agent as indemnity. Other creditors of the customer took mortgages at a later date and upon foreclosure, priority was claimed for the indemnity mortgage on behalf of the principals in the agency; it was held, *Brinkerhoff, J.* (21): "Now, it is a familiar principle of equity jurisprudence, that where a surety, or person standing in the situation of a surety

for the payment of a debt, receives a security for his indemnity, the principal creditor is, in equity, entitled to the full benefit of that security. It follows from this principle, and the state of facts we have found, that, had there been no assignment of the mortgage of indemnity from L. to G. & S., and had G. & S. fixed the liability of L. by action and judgment at law, G. & S. might then come into a court of equity as complainants and make L.'s mortgage of indemnity perfectly available to themselves."

See also *Kunkel vs. Fitzhugh*, 22 Md. 567.

⁶⁶ *Durham vs. Craig*, 79 Ind. 117.

⁶⁷ *Carpenter vs. Bowen*, 42 Miss. 28.

But see *Jones vs. Quinnipiack Bank*, 29 Conn. 25.

⁶⁸ *Ten Eyck vs. Holmes*, 3 Sandf. Ch. 428.

But see *Helm's Admr. vs. Young*, 9 B. Mon. (Ky.) 394.

Where the indemnity is furnished by a stranger, and does not come out of the property of the principal, it does not create a trust in favor of the creditor.⁶⁹ Nor where it is furnished by one surety to another.

The distinction between indemnity furnished by the debtor and indemnity from a stranger or co-surety, is stated with clearness by Mr. Justice Matthews of the Federal Supreme Court: "When a debtor, who has given personal guaranties for the performance of his obligation, has further secured it by a pledge in the hands of his creditor, or an indemnity in those of his surety, it is conformable to the presumed intent of all the parties to the arrangement, that the fund so appropriated shall be administered as a trust for all the purposes, which a payment of a debt will accomplish; and a court of equity will accordingly give it this effect. All this, it is to be observed, as the rule verbally requires, presupposes that the fund specifically pledged and sought to be primarily applied, is the property of the debtor, primarily liable for the payment of the debt; and it is because it is so, that equity impresses upon the trust, which requires that it shall be appropriated to the satisfaction of the creditor, the exoneration of the surety, and the discharge of the debtor. . . . It follows that the present case cannot be brought within either the terms or the reason of the rule, for, as the property, in respect to which the creditors assert a lien, was not the property of the principal debtor, and has never been expressly pledged to payment of the debt, so no equitable construction can convert it by implication into a security for the creditor."⁷⁰

⁶⁹ Taylor vs. Farmers' Bank of Ky., 87 Ky. 398; 9 S. W. 240; Macklin vs. Northern Bank of Ky., 83 Ky. 314; O'Neill vs. State Savings Bank, 34 Mont. 521; 87 Pac. 970; Dinsmore vs. Sachs, 133 Md. 434; 105 Atl. 524.

⁷⁰ Hampton vs. Phipps, 108 U. S. 260; 2 S. Ct. 622. Continuing, the Court says: "It is urged that the logic of the rule would extend it so as to cover the case of all securities held by sureties for purposes of indemnity of whatsoever character

and by whomsoever given. But this suggestion is founded upon a misconception of the scope of the rule and the rational grounds on which it is established. Of course, if an express trust is created, no matter by whom, nor of what, for the payment of the debt, equity will enforce it, according to its terms, for the benefit of the creditor, as a *cestui que trust*; but the question concerns the

In Mississippi a distinction is made between a security given for the indemnity of the surety, and a security which the surety holds for the payment of the debt. In the one case it is considered that it is available to the surety only in case he pays the debt, and hence not available to the creditor at all, since if the surety becomes insolvent and does not pay, the contingency upon which the surety might resort to the security never arises and therefore no subrogation arises to the creditor.⁷¹ But if the collateral is held upon condition that it shall be applied to the payment of the debt, it may be enforceable by the creditor.⁷²

An indorsee of a promissory note is subrogated to the securities held by his indorser; whether the securities are transferred to him or not⁷³ and a cancellation of the lien of a mortgage held by the indorser will not destroy the lien of the indorsee.⁷⁴

creation of a trust, by operation of law, in favor of a creditor, in a case where there was no duty owing to him, and no intention of bounty. A stranger might well choose to bestow upon a surety a benefit and a preference, from considerations purely personal, in order to make good to him exclusively any loss to which he might be subjected in consequence of his suretyship for another. In such a case, neither co-surety nor creditor could, upon any ground of priority in interest, claim to share in the benefit of such a benevolence."

⁷¹ Pool vs. Doster, 59 Miss. 258; Clay vs. Freeman, 74 Miss. 816; 20 South, 871.

⁷² Ross vs. Wilson, 7 S. & M. (Miss.) 753; Carpenter vs. Bowen, 42 Miss. 28.

The distinction between indemnity to the surety and a security available in terms for the creditor is not generally recognized.

Meyers vs. Campbell, 59 N. J. L. 378; 35 Atl. 788.

⁷³ Harmony Nat. Bank's Appeal, 101 Pa. 428; Kelley vs. Whitney, 45

Wis. 110; Potter vs. Stevens, 40 Mo. 229; Merchant's Nat. Bank vs. Aher-nathy, 32 Mo. App. 211; Updegraff vs. Edwards, 45 Iowa 513; Boyd vs. Parker, 43 Md. 183.

⁷⁴ McCracken vs. German Fire Ins. Co., 43 Md. 471.

"The complainant, as the holder of the note, and consequently of the debt secured by the mortgage, is, in equity, to be considered the real mortgagee, or as substituted to all the rights of indemnity secured by the mortgage upon the property. The mortgage, in truth and fairness, could not be discharged or released by the association under such circumstances, without the consent of the complainant, or payment of the note, more especially as the Company was not able to pay its debts at the time. Before the association undertook to release the mortgage they should have taken care, in good faith, to have seen that the note of the complainant was paid. His debt not being paid, and the Company insolvent, he had the right to resort to the indemnity furnished by

It is held that since the indorsee is subrogated only by considerations of equity that he will take the security subject to all the prior equities whether the transfer is before or after the maturity of the note.⁷⁵

§256. Same subject — The view of the English courts.

While the doctrine that a creditor is subrogated to the securities of the surety originated with the English courts of equity,⁷⁶ the application of the rule has undergone some modification in England.

Where both the acceptor and drawer of bills were in bankruptcy and the acceptor had been given security by the drawer, and the holders of the bills were claiming subrogation to the security, it was held by Lord Eldon that the holders had no equity of subrogation running to them.

In this case the order was made permitting the proceeds of the collateral to be applied to the bills, but this was based upon the fact that both parties were in bankruptcy and that such application was in the right of the bankrupts, and not because of any equity due the creditor. The Lord Chancellor said, "It will be sufficient for me to say, that supposing a commission not to have issued, I do not see anything in this transaction, between persons thus dealing with their bankers, and making a deposit of this sort, which would entitle the creditors to say that they have an equity attaching on these effects; that is to say, that

the mortgage. The release of the mortgage by the association, as his trustee, without the payment of his debt, was a breach of trust, totally unauthorized, and did not destroy his lien on the property."

⁷⁵ *Petillon vs. Noble*, 73 Ill. 567; *Melendy vs. Keen*, 89 Ill. 395; *U. S. Mortgage Co. vs. Gross*, 93 Ill. 483.

⁷⁶ *Maure vs. Harrison*, 1 Eq. Cases, Abridgment 93, placitum 5 (1692). The opinion in full appears to be: "A bond creditor shall, in this Court, have the benefit of all counter

bonds or collateral security given by the principal to the surety; as if A. owes B. money, and he and C. are bound for it, and A. gives C. a mortgage or bond to indemnify him, B. shall have the benefit of it to recover his debt."

See also *Wright vs. Morley*, 11 Ves. 22. "I conceive, that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to that creditor."

the moment a pledge is put into the hands of the banker, he becomes a surety for them to whom his acceptances are delivered. If there were such an equity, the consequence must be, that the banker and the person whose depositary he is could come to no new arrangement without the consent of the creditors. It is enough for me to say, that the petition can not be supported upon this ground.”⁷⁷

The subject of the right of bill holders to be subrogated to securities in the hands of the acceptor, where both drawer and acceptor are in bankruptcy, has arisen in a more recent case and the equity of the order of Lord Eldon questioned, and it was considered that the holders were not entitled to subrogation to the securities in the hands of the acceptor, and that the holders were not even entitled to have the securities applied on their claim in the adjustment of the bankruptcy affairs in the manner provided in the order of Lord Eldon, but that the bankrupt acceptor was entitled to use the security in paying the dividends due the holders, and was not required to apply the security in reduction of the bills and then respond in dividends for the balance.⁷⁸

⁷⁷ *Ex parte Waring et al.*, 2 Glyn & Jameson 404 (1815).

See also *Powles vs. Hargreaves*, 3 De G. M. & G. 430; *City Bank vs. Luckie*, 5 Ch. App. 773; *Vaughan vs. Halliday*, 9 Ch. App. 561.

⁷⁸ *Royal Bank vs. Commercial Bank*, L. R., 7 App. Cases 366 (1882). In this case the Royal Bank held acceptances amounting to £16,000 and the acceptor held securities of the drawer amounting to about £4,000, and the question was whether the estate of the bankrupt acceptor should use the securities in paying the dividend due the holders, or whether the holders were entitled to have the security applied in reduction of their claim and have their dividend for the balance. In other words, if the estate should pay

a dividend of 5s. in the pound, the dividends would be taken care of in full by the securities without any deduction from the bankrupt's estate. But if the securities were first applied to the claim, thus leaving unpaid £12,000 the holders would be entitled to receive out of the bankrupt's estate £3,000 additional as their dividend. It was considered that the subrogation asked for would violate the contract between the drawer and acceptor and that the latter was entitled to have the securities applied in such a way as would give him the largest indemnity.

See also *In re Walker*, L. R., 1 Ch. 621 (1892), wherein the early case of *Maure vs. Harrison*, *ubi supra*, is examined and the conclusion reached

§257. Remedies of the surety in cases where he is deprived of subrogation by act of the creditor.

The creditor owes a duty of good faith toward the surety, if he releases in whole or in part any security belonging to the principal which he holds for the account of the debt, to that extent the surety will be discharged.⁷⁹

If the creditor fails to do that which is necessary in order to make the security available, the surety will be discharged, as where he neglects to file a mortgage for record and other liens intervene rendering the security of no value,⁸⁰ or releases a levy of execution which had been placed upon the property of the principal.⁸¹

If the creditor has a judgment for the debt which is a lien upon the land of the principal and cancels it, he thereby deprives the surety of his subrogation and accordingly discharges him from liability to the extent of the value of the land.⁸²

The fact that the creditor has in his possession property of the principal, does not of itself entitle the surety to be subrogated, but the surety can claim such equity only in cases where the deposit or the lien arose out of the same transaction as the suretyship.

Where a bank is creditor and the principal is a depositor, the relation between the bank and the depositor being merely that of debtor and creditor does not give to the bank any lien on the deposit as security for loans made to the depositor, and

that the case was erroneously reported and the Court concludes: "Under these circumstances it seems to me that there is no real authority for the proposition in question; and upon principle, I cannot see why a surety who takes from the principal debtor a bond or indemnity at once becomes a trustee of that, for the principal creditor."

⁷⁹ Ante Sec. 98, 99.

⁸⁰ Toomer vs. Dickerson, 37 Ga.

428; Teaff vs. Ross, 1 O. S. 469; Burr vs. Boyer, 2 Neb. 265; Capel vs. Butler, 2 Sim. & Stu. 457; Wulff vs. Jay, L. R., 7 Q. B. 756.

⁸¹ Hutton vs. Campbell, 10 Lea (Tenn.) 170; Mulford vs. Estudillo, 23 Cal. 94; Spangler vs. Sheffer, 69 Pa. 255; Winston vs. Yeargin, 50 Ala. 340.

⁸² Robeson vs. Roberts, 20 Ind. 155; Hollingsworth vs. Tanner, 44 Ga. 11.

if a surety pays the bank such loan, he will not be subrogated to the deposit, and the bank violates no duty to the surety in paying the checks of a depositor even after default.⁸³

If a surety pays the debt without knowledge that the creditor has released securities or property of the principal or done some act in reference thereto which renders such security unavailable, he may maintain an action against the creditor to recover back what he has paid, at least to the extent of the loss resulting from his failure to realize on his expected subrogation.⁸⁴

§258. When surety will be subrogated to the principal's claims of set-off against the creditor.

The practical difficulties involved in the application of equitable set-off or counterclaim as a defense to a promisor in suretyship, where the set-off is claimed in the right of the principal, have been considered in a previous chapter.⁸⁵

The equity of subrogation must give way to the legal rights of the other parties to the transaction, and where the claim to be set off exceeds the debt for which demand is made of the surety, and the principal is not a party to the suit against the surety, the promisor can not be subrogated to the cross demands of the principal. To hold otherwise would deprive the principal of the balance of his claim against the creditor, as his claim could not be divided, and a large cross-demand might thus be used to settle a small claim. But where the principal and surety are both parties to the action, the right of subrogation to the set-off is fully established.⁸⁶

⁸³ *Nat. Bank of Newburgh vs. Smith*, 66 N. Y. 271; *Voss vs. German Bank*, 83 Ill. 599; *Grissom vs. Commercial Bank*, 87 Tenn. 350; 10 S. W. 774.

⁸⁴ *Chester vs. Kingston Bank*, 16 N. Y. 336.

⁸⁵ *Ante* Sec. 117.

⁸⁶ *Springer vs. Dwyer*, 50 N. Y. 19; *Bathgate vs. Haskin*, 59 N. Y. 533; *Harris vs. Rivers*, 53 Ind. 216.

See also *Cases Cited Ante* Sec. 117.

But see *Hollister vs. Davis*, 54 Pa. 508.

Bechervaise vs. Lewis, L. R., 7 C. P. 372. Where an unliquidated demand due the principal by the creditor resulting from a failure of consideration for the promissory note of the principal was permitted to be set off in an action against the surety upon the note.

Where the principal is insolvent, an unliquidated demand for breach of contract in favor of the principal

§259. Subrogation not available to one who pays the debt of another as a mere volunteer.

Those who are in the situation of a surety, in the sense that they pay the debt of another, but who are under no obligation to pay such debt, and who do not, by paying, preserve and protect some interest in their own property, are mere volunteers and not within the equity of subrogation.

The rule has been thus stated: "The doctrine of subrogation is a pure unmixed equity and from its very nature, never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound, and as far as I have been able to learn its history, it never has been so applied. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty. I have seen no case, in which a stranger, who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principle."⁸⁷

against the creditor is generally permitted to be set off by the surety. *Hiner vs. Newton*, 30 Wis. 640; *McDonald Mfg. Co. vs. Moran*, 52 Wis. 203; 8 N. W. 864.

Where the amount claimed by way of set-off is less than the amount involved in the suretyship, the set-off in favor of the surety may be allowed without any interference with the right of the principal. *Murphy vs. Glass*, L. R., 2 P. C. 408; *Cole vs. Justice*, 8 Ala. 798.

⁸⁷ *Gadsden vs. Brown*, *Speer's Eq.* (S. C.) 37; *Journal Publishing Co. vs. Barber*, 165 N. C. 478; 81 S. E. 694.

See also *Moran vs. Abbey*, 63 Cal. 56; *Young vs. Morgan*, 89 Ill. 199; *McClure vs. Andrews*, 68 Ind. 97; *Binford vs. Adams*, 104 Ind. 41; 3 N. E. 753; *Roth vs. Harkson*, 18 La. Ann. 705; *Brice vs. Watkins*, 30 La. Ann. 21; *Commonwealth vs. Ches. & O. Canal Co.*, 32 Md. 501; *Smith vs. Austin*, 9 Mich. 465; *Desot vs. Ross*, 95 Mich. 81; 54 N.

W. 604; *St. Francis Mill vs. Sugg*, 83 Mo. 476; *Price vs. Courtney*, 87 Mo. 387; *Bunn vs. Lindsay*, 95 Mo. 250; 7 S. W. 473; *Cole vs. Malcolm*, 66 N. Y. 363; *Wormer vs. Waterloo Agricultural Works*, 62 Iowa 699; 14 N. W. 331; *Rheeling's Appeal*, 107 Pa. 161; *Watson vs. Wilcox*, 39 Wis. 643; *McNeil vs. Miller*, 29 W. Va. 480; 2 S. E. 335; *Aetna Life Ins. Co. vs. Middleport*, 124 U. S. 534; 8 S. Ct. 625; *Charnock vs. Jones*, 115 N. W. 1072; *Davis vs. Davis*, 69 Atl. 876; *Cape Girardeau Bell Telephone Co. vs. Hamil's Estate*, 134 S. W. 1103.

But see *Gans vs. Thieme*, 93 N. Y. 225. Where subrogation was upheld in favor of one who paid off an incumbrance at the request of an executrix of the owner for the preservation of the property in the interest of the estate. The doctrine of this case carries the rule of subrogation to the extreme point of

It is not always easy to determine whether or not the payment is by one in the situation of a surety. If a debt is paid by one who in good faith supposes himself to be a surety and bound for it, but who in fact was not liable, he is a mere volunteer and not entitled to subrogation.

Thus a name was signed as surety upon the bond of a sheriff, by one who was acting as agent for the surety, the surety was advised that the bond so signed by his agent was valid and binding upon him and he paid the penalty of the bond upon default of the sheriff and claimed the benefits of subrogation. It was held that under the statute the signing by the agent did not make a binding contract in suretyship, because the authority to sign was not in writing, and that one paying the debt of another under these circumstances was a mere volunteer and not entitled to subrogation.⁸⁸

application in holding that a payment by a third person at the request of a party having no personal interest in the security does not leave the party paying in the position of a mere volunteer.

Danforth, J.: "It is no doubt true, however, as the learned counsel for the respondent argues, that a volunteer cannot acquire either an equitable lien or a right to subrogation, but one who, at the request of another, advances his money to redeem or even to pay off a security in which that other has an interest, or to the discharge of which he is bound, is not of that character, and in the absence of an express agreement one would be implied, if necessary, that it shall subsist for his use, and it will be so enforced. But the doctrine of substitution may be applied although there is no contract, express or implied. It is said to rest 'on the basis of mere equity and benevolence' and is resorted to

for the purpose of doing justice between the parties."

See also *Wilson vs. Brown*, 13 N. J. Eq. 277. "To entitle a party who pays the debt of another to the rights of the creditor by subrogation, the debt must be paid *at the instance of the debtor*, or the person paying it must be liable, as security or otherwise, for its payment."

It is held that a person under no obligations to pay, and having no interest of his own to protect, may be subrogated to the securities of the debtor, where the payment is at the request of the debtor and the rights of third parties have not intervened. This rule may be supported on the ground of estoppel as the debtor should not be permitted to redeem his securities as against the one who pays his debt. *Oury vs. Saunders*, 77 Tex. 278; 13 S. W. 1030.

⁸⁸ *Dawson vs. Lee*, 83 Ky. 49.

But see *Capehart vs. Mhoon*, 5 Jones Eq. (N. C.) 178.

It is held that an agent who advances for the account of his principal is not a volunteer and will be entitled to subrogation.⁸⁹

If the obligation of the one in the situation of a surety is informal, and on that account not enforceable against him, but which creates a moral obligation to pay, it has been held that payment by the one so bound will entitle him to subrogation.⁹⁰

One performing medical services to one who has a lien upon land for his care and support is considered to be entitled to subrogation to the position of the lien holder, although the service was performed without any special agreement for substitution.⁹¹

⁸⁹ *Curry vs. Curry*, 87 Ky. 667; 9 S. W. 831.

⁹⁰ *Slack vs. Kirk*, 67 Pa. 380.

⁹¹ *Huffmond vs. Bence*, 128 Ind. 131; 27 N. E. 347.

See also *Price vs. Sanders*, 60 Ind. 310. Where it is held that one who advances money in the purchase of necessities for an infant is subrogated to the position of one who furnishes necessities to an infant.

But see *Skinner vs. Tirrel*, 159 Mass. 474; 34 N. E. 692. Where one advancing necessities to a wife living apart from her husband was denied the right of subrogation to the rights of the wife against the husband.

Morton, J. "There can be no subrogation unless there is something to be subrogated to. A debt or liability cannot be created where none existed for the purpose of effecting a substitution. There never was any liability on the part of the defendant to the parties who furnished the wife with the necessities.

. . . Although the right of subrogation does not depend on contract, but rests on natural justice and equity, there must be either an agreement, express or implied, to subrogate, or some obligation, interest, or right, legal or equitable,

on the part of the party making the payment or advance in respect of the matter concerning which payment is made or money advanced, in order to entitle him to subrogation.

. . . So far as subrogation is concerned, the plaintiff's contention resolves itself into the proposition that the defendant's wife could have bought on her husband's credit the necessities which she purchased and paid for with the money advanced to her by the plaintiff; that if the plaintiff had paid the parties supplying the necessities their several demands, she would have been entitled to be subrogated to their claims against the defendant; and that therefore a decree should be entered in her favor against the defendant in this suit. If the premises are correct, manifestly the conclusion does not follow from them. There are ancient and modern cases in England which hold that a person advancing money to a married woman under circumstances like those in this case can recover the same of the husband in equity. *Harris vs. Lee*, 1 P. Wms. 482; *Marlow vs. Pitfield*, 1 P. Wms. 558; *Deare vs. Soutten*, L. R., 9 Eq. 151; *Jenner vs. Morris*, 3 DeG. F. & J. 45. See also *In re Wood*, 1 DeG. J. &

§260. Conventional subrogation.

Conventional subrogation is the substitution of the surety in place of the creditor by agreement as distinguished from subrogation by operation of law where no such agreement is made.

The convention or agreement for subrogation frequently extends to the surety advantages which the law itself does not bestow, thus a mortgagee in consideration of a payment of less than the full amount of the debt may assign the mortgage security to the party paying, and such assignment subrogates the purchaser to all the rights of a mortgagee and to the full amount of the debt; or a creditor, in consideration of receiving payment before it is due may transfer the debt to the surety, who is thus substituted to the position of the creditor and entitled to collect the full amount from the debtor, and, if such is the agreement, is entitled to an assignment of the debtor's collateral on the same terms. The opportunity for speculation in the amount of recovery against the debtor is not afforded by the equity of subrogation which arises by operation of law.

Again, equitable subrogation cannot be enforced until the entire debt is paid,⁹² but conventional subrogation arises at such time and for such part of the debt as the parties in their agreement shall stipulate.

Where a mortgagee receiving payment from a junior incumbrancer of the first installment of the debt as it matured, agreed that the party paying the note should hold it as a subsisting lien in the same right as the mortgagee, it was considered that

S. 465. These cases have been followed in this country in Connecticut (*Kenyon vs. Farris*, 47 Conn. 510), and there is a dictum in a case in Pennsylvania, *Walker vs. Simpson*, 7 Watts & Serg. 83. . . . But those cases do not appear to us to rest on any satisfactory principle." In *Harris vs. Lee*, cited above, the holding was: "Admitting the wife cannot at law borrow money, though for necessities, so

as to bind the husband, yet this money being applied to the use of the wife for her use and for necessities, the plaintiff that lent this money, must in equity stand in the place of the persons who found and provided such necessities for his wife. And therefore, as such persons would be creditors of the husband, so the plaintiff shall stand in their place and be a creditor also."

⁹² *Ante*, Sec. 245. *Home Savings Bank vs. Bierstadt*, 168 Ill. 618; 48 N. E. 161.

by reason of this agreement the junior incumbrancer was subrogated to a prior lien for the installment paid as against the balance of the installments due the senior mortgagee. The Court said: "If M. had paid and taken up the coupon notes in controversy as a junior incumbrancer merely, and without any express agreement with the mortgage company, he would, at his option, have become subrogated to the rights of the company in the notes, subject only to the condition that he could not enforce their payment as a lien against the mortgaged property, while any part of the mortgaged debt thereafter to become due remained unpaid. But the express agreement, which the evidence tended to establish, was that M., on paying and taking up the notes should be permitted to hold them in the same manner as the company had theretofore held them, that is to say, as a prior and subsisting lien enforceable against the mortgaged property by appropriate foreclosure proceedings. That amounted, in legal effect, to a waiver on the part of the company of its right to insist upon a postponement of M.'s claim for reimbursement until the remainder of the mortgaged debt was satisfied, as it might have done in the absence of such an agreement, and fairly overcame the presumption which would have been otherwise operative against him, that he took up the coupon notes merely to protect his title acquired through a junior mortgage."⁹³

Such conventional subrogation will be applied as against other lien holders of the property, not parties to the agreement, as where a part payment was made on a mortgage under an agreement between the debtor and creditor and the one paying, that the latter should be subrogated to the priority of the mortgagee, it was held that a junior incumbrancer whose lien had already attached was postponed to the rights acquired under the subrogation.⁹⁴

⁹³ *Morrow et al. vs. United States Mortg. Co.*, 96 Ind. 21.

⁹⁴ *Shreve vs. Hankison*, 34 N. J. Eq. 76. The Chancellor states the rule thus: "It is urged, on the part of Vanderheck, that the rule which

denies subrogation in case of merely partial payment is fatal to that claim. But that rule is not applicable to this case.

"Risdon Hankison's claim is for conventional, not legal, subrogation

§261. Waiver of subrogation.

A party to any transaction, may at any time by express waiver relinquish the advantages and benefits which the law bestows as an incident to his position, or which he has specially contracted to receive. Such voluntary act of waiver by a person entitled to subrogation cancels all claims on the property and interests available, and at once restores the property to the debtor and those claiming through him.

An involuntary waiver of subrogation, such as arises from presumption of law or from acts and circumstances which render it no longer equitable that subrogation should be preserved, has the same effect, and results also in the immediate establishment of the rights of others as superior to those of the promisor in suretyship, even though he pays the debt.

A delay in enforcing the privilege of subrogation until the claim of the surety against the principal for indemnity has become barred by the Statute of Limitations, is a conclusive waiver, as an equitable right cannot be enforced if the legal right upon which it is based is barred.⁹⁵ The statute begins to

A stranger, who, by the authority and consent of the debtor, and on his agreement that he shall be subrogated to the rights of the creditor, makes payment for the debtor, will be subrogated if the payment is made with the express declaration of the subrogation in the release made by the creditor."

See also *Loeb vs. Fleming*, 15 Ill. App. 503, *McAllister, J.*: "It is well settled that a surety can neither at law nor in equity call for an assignment of the claim of the creditor against his principal, or be clothed, by the mere operation of law, and upon principles of equity, with the rights of an assignee of such claim, unless he has

paid the entire debt of the creditor.

. . . . The courts have sometimes recognized what has been called a conventional subrogation, resulting from an express agreement with the creditor to the effect that the security held by him shall be assigned to the person paying, or kept on foot for his benefit. When the right of subrogation is the result of an express agreement, it is no objection that it extends only to a part of the mortgage or other security." *Platte Valley Cattle Co. vs. Bosserman-Gates L. S. & L. Co.*, 202 Fed. 692.

⁹⁵ *Arbogast vs. Hays*, 98 Ind. 26; *Kreider vs. Isenbice*, 123 Ind. 10; 23 N. E. 786; *Rittenhouse vs. Levering*, 6 Watts & Serg. (Pa.) 190; *Hutcherson vs. Reasch*, 15 Pa. Super. Ct. 96.

run against the surety on his right of subrogation at the time he pays the debt.⁹⁶

If there has been a delay in asserting subrogation, although less than the statutory period of limitations, and third persons without knowledge of the suretyship have acquired liens on the property, the right of subrogation will be deemed waived as to such intervening lienors.⁹⁷

A surety does not waive his equity of subrogation to securities held by the creditor by accepting collateral or other security from the principal debtor,⁹⁸ or from a stranger.⁹⁹

§262. Contribution between co-sureties — General principles.

The basis of the right of contribution between co-sureties is the maxim that equality is equity. The earliest adjudications were based upon the custom of the city of London whereby persons having a common liability with others were put under obligations to reimburse their co-obligors who paid more than their share. Neither law nor equity furnished the remedy, since no express promise was made by the co-surety to contribute to the common burden, and none could be implied, as each undertaking was independent of the other and often one was made without the knowledge of the other, but inasmuch as it was the custom to those so bound to share the burden equally, it was considered a duty which should be enforced by a decree of the court.¹⁰⁰

The equity of contribution between persons jointly or severally bound for the same duty has always been considered

⁹⁶ *Beaunett vs. Cook*, 45 N. Y. 268; *Blake vs. Traders' Bank*, 145 Mass. 13; 12 N. E. 414; *Rucks vs. Taylor*, 49 Miss. 552; *Bushong vs. Taylor*, 82 Mo. 660; *Hammond vs. Myers*, 30 Tex. 375; *Maxey vs. Carter*, 10 Yerg. (Tenn.) 521.

⁹⁷ *Gring's Appeal*, 89 Pa. 336; *Smith vs. Harbin*, 124 Ind. 434; 24 N. E. 1051; *Noble vs. Turner*, 69 Md. 519; 16 Atl. 124; *American Fidelity Co. vs. East Ohio Sewer Pipe Co.*, 101 N. E. 671.

⁹⁸ *Crawford vs. Richeson*, 101 Ill. 351.

But see *Henley vs. Stemmons*, 4 B. Mon. (Ky.) 131.

⁹⁹ *Wesley, Church vs. Moore*, 10 Pa. 273; *West vs. Rutland Bank*, 19 Vt. 403.

¹⁰⁰ *Offley vs. Johnson*, 2 Leon 166; *Laver vs. Nelson*, 1 Vern. 456; *Koch's Estate*, 148 Wis. 548; 134 N. W. 663. The right to contribution is not affected by the fact that one of the two sureties is a surety for compensation, while the other is a surety for accommodation." *U. S. F. & G. Co. vs. McGinnis' Admr.*, 147 Ky. 781; 145 S. W. 663.

clear and undoubted, and courts of both law and equity now apply the remedy with great liberality to the one invoking such relief.

Some difficulty, however, has apparently been encountered in stating a reason for contribution that is flexible enough to meet all contingencies.

The notion of implied contract, such as applies to the surety in his relations with the principal upon which he bases his right of indemnity, is not available for all cases of co-sureties, as the earlier surety often signs, and even pays his obligation without knowing that another is to be or has become co-surety on the same instrument. The same is true also of cases where co-sureties are bound for the same duty by different instruments, and each without the knowledge of the other.

In an early case considered in England, in which the remedy was applied as a matter of right, as distinguished from the precedents which were founded upon custom, the several sureties were bound on separate instruments, and a rule was stated which has ever since been adhered to. "It is admitted, that if they had all joined in one bond for £12,000 there must have been contribution. But this is said to be on the foundation of contract implied from their being parties in the same engagement, and here the parties might be strangers to each other. And it was stated that no man could be called upon to contribute who is not a surety upon the face of the bond to which he is called to contribute. The point remains to be proved that contribution is founded on contract. If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract. . . . The reason is, they are all *in aequali jure*, and as the law requires equality they shall equally bear the burden. . . . In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of these cases sureties have a common interest and a

common burthen. . . . At law all the bonds are forfeited. The balance due might have been so large as to take in all the bonds, but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay the crown; but as between themselves they are *in aequali jure*, and shall contribute.”¹⁰¹

¹⁰¹ *Deering vs. Winchelsea*, 2 B. & P. 270; S. C., 1 Cox 318 (1787).

There is general acquiescence in the doctrine that contribution between co-sureties will be enforced upon the basis of equitable obligation, and that the court should undertake to require parties so related to do that which they ought to do, and not consider it necessary to adopt a legal fiction of implied promise in enforcing the rule.

Wells vs. Miller, 66 N. Y. 255, *Church, C. J.*: “The right to contribution between co-sureties depends upon principles of equity rather than upon contract. It is well settled that the liability exists, although the sureties are ignorant of each other’s engagement. The equity springs out of the proposition that when two or more sureties stand in the same relation to a principal, they are entitled equally to all the benefits, and must bear equally all the burdens of the position. In such a case the maxim ‘equality is equity’ applies.”

Robinson vs. Boyd, 60 O. S. 57; 53 N. E. 494, *Minshall, J.*: “The claim of the defendant below is, that the plaintiff is not entitled to contribution, because there is no privity of contract between them. . . . We do not find the doctrine of contribution so limited, nor is it required by the principle on which it rests. It is not founded on contract, but arises from the equitable consideration that persons subject to a

common duty or debt, should contribute equally to the discharge of the duty or debt; and so where one performs the whole duty or pays the debt or more than his aliquot part, each of the others should contribute to him, so as to equalize the discharge of what was a common burthen.”

White vs. Banks, 21 Ala. 705, *Goldthwaite, J.*: “Sureties have the right to claim contribution from each other, in proportion to the amount paid by each upon the common debt; and this right is the result, not of any implied contract between the parties, but of an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions.”

See also *Klepper vs. Borchsenius*, 13 Ill. App. 318; *Dennis vs. Gillespie*, 24 Miss. 581; *Smith’s Executors vs. Anderson*, 18 Md. 520; *Allen vs. Wood*, 3 Ired. Eq. (N. C.) 386; *Aldrich vs. Aldrich*, 56 Vt. 324.

The view has frequently been expressed that the liability to contribution rests upon implied contract. This is perhaps but another way of stating the same proposition upon which the cases rest which assume the absence of all contract relations.

Batard vs. Hawes, 2 El. & Bl. 287, *Lord Campbell, C. J.*: “To support the action for money paid, it is necessary that there should be a request from the defendant to pay,

The equitable doctrine of contribution became so well established that courts of law assumed jurisdiction to enforce the right by adopting the fiction, in many cases, that the parties entered into the contract of suretyship upon the mutual under-

either express or implied by law. . . . In a joint contract for the benefit of all, each takes upon himself the liability to pay the whole debt, consisting of the shares which each co-contractor ought to pay as between themselves; and each, in effect, takes upon himself a liability for each to the extent of the amount of his share. Each, therefore, may be considered as becoming liable for the share of each one of his co-contractors at the request of such co-contractor; and, on being obliged to pay such share, a request to pay it is implied as against the party who ought to have paid it."

The same idea of implied contract is suggested by Lord Eldon in *Craythorne vs. Swinburne*, 14 Ves. Jr. 164, who says: "And I think that right is properly enough stated as depending rather upon a principle of equity than upon contract; *unless in this sense*; that, the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground, of implied assumpsit, that in modern times Courts of Law have assumed a jurisdiction upon this subject."

See also *Mathews vs. Aikin* 1 N. Y. 601. Where the Court in commenting upon *Norton vs. Coons*, 3 Denio 130, says: "In that case the circumstances under which the defendant became co-surety were such as to repel the presumption of any promise to make contribution. But the Court held that his being a

surety on the same contract without qualification in terms was sufficient to fix his obligation to contribute, and that for the purpose of giving the plaintiffs a remedy the court would presume a promise. A promise was, therefore, imputed where none confessedly existed, in order to provide a remedy for the party where there was no doubt as to the legal liability; and the legal liability in such cases springs from the equitable obligation."

Russell vs. Faylor, 1 O. S. 327. *Bartley, C. J.*: "The right of contribution among sureties is founded not in the contract of suretyship, but is the result of a general principle of equity which equalizes burdens and benefits. The common law has adopted and given effect to this equitable principle on which a surety is entitled to contribution from his co-surety. This equitable obligation to contribute, having been established, the law raises an implied assumpsit on the part of the co-surety to pay his share of the loss, resulting from a concurrent liability to pay a common debt."

Bradley vs. Burwell, 3 Denio 61. *Jewett, J.*: "I think that the law implies a contract between co-sureties to contribute, ratably, towards discharging any liability which they may incur in behalf of their principal, such contract originating at the time they execute the principal obligation."

Agnew vs. Bell, 4 Watts (Pa.) 32, *Kennedy, J.*: "This right has been considered as depending rather

standing that if the principal failed to keep his engagement all who were collaterally bound for the same debt would share the loss, whether they made their contract at the same time or on the same instrument or not, and whether one co-surety had knowledge of the engagement of the other or not.

A practical distinction arises between actions upon implied contracts and actions upon a purely equitable basis in the application of the Statutes of Limitations of the various States, and generally a longer period of limitation is applied in favor of actions cognizable in equity than at law.

It was held in Wisconsin that the right of contribution rests upon implied contract and therefore barred in six years, and that the limitation of ten years as to actions in equity did not apply.¹⁰²

§263. Contribution between sureties bound by different instruments.

If several promisors are bound for a common burden even though by separate instruments they will be liable to contribute to each other.¹⁰³

upon a principle of equity than upon contract; but it may well be considered as resting alike on both for its foundation; for although, generally, there is no express agreement entered into between joint sureties, yet from the uniform and almost universal understanding which seems to pervade the whole community, that from the circumstance alone of their agreeing to be, and becoming accordingly co-sureties of the principal, they mutually become bound to each other to divide and equalize any loss that may arise therefrom to either or any of them, it may with great propriety be said that there is at least an implied contract."

See also *Lansdale's Admrs. vs. Cox*, 7 T. B. Mon. (Ky.) 401; *Bachelder vs. Fiske*, 17 Mass. 464.

¹⁰² *Bushnell vs. Bushnell*, 77 Wis. 435; 46 N. W. 442. The Statutes of Limitation in Wisconsin provide a limitation of six years upon an action on any contract, obligation or liability, express or implied (Sec. 4222, Sub. 3), and ten years upon an action cognizable in equity (Sec. 4221, Sub. 4).

The same distinction for the purpose of applying the statute of limitations is made in Ohio. *Neilson & Churchill vs. Fry*, 16 O. S. 552.

See also *Tate vs. Winfree*, 37 S. E. (W. Va.) 956.

In Georgia the action is governed by same statute which limits the action on the principal obligation. *Train vs. Emerson*, 80 S. E. 554.

¹⁰³ *Deering vs. Winchelsea*, 2 B. & P. 270; *Schram vs. Werner*, 85 Hun 293; 32 N. Y. S. 995.

If the undertakings are for different amounts their liability in contribution will be in proportion.¹⁰⁴

In the matter of contribution between sureties bound by different instruments the rule is the same whether the sureties are each bound for an aliquot part of the debt or for the entire debt. If the latter, the relation between the sureties is the same in all respects as if they had joined in one instrument.¹⁰⁵ If, however, the liability for an aliquot part is further limited so that the non-payment by one surety does not affect the amount to be paid by any other surety, they are held not to be co-sureties and so not liable in contribution.^{105a} Where successive bonds are cumulative, the right of contribution arises, and covers such liability as is common to both.¹⁰⁶

Contribution between sureties upon different instruments will not be allowed except they each relate to the same transaction. It is not sufficient that they secure liabilities which arise out of the same duty.

If several bonds or obligations are given to indemnify against the default of another growing out of the same transaction, the promisors will be co-sureties, even though their respective liabil-

"The obligation of co-sureties to contribute to each other has grown out of that favorite rule of equity that equality is equity. It is not at all founded upon the idea of contract between sureties, and may be invoked by the one against the other when he has been compelled to pay for the principal debtor, although without any knowledge down to the time of payment or later that his co-surety has also obligated himself to pay the same debt. Nor will their becoming sureties at different times and by different instruments without the knowledge of each other affect their liability to contribute one to the other as co-sureties."

Bright vs. Lennon, 83 N. C. 183.

¹⁰⁴ Armitage vs. Pulver, 37 N. Y. 494; Jones vs. Blanton, 6 Ired. Eq. (N. C.) 115; Young vs. Shunk, 30 Minn. 503; 10 N. W. 402; Ellesmere Brewing Co. vs. Cooper, 1 Q. B. L. R. 75; Fidelity & Deposit Co. vs. Phillips, 84 Atl. 432.

¹⁰⁵ Hughes vs. Boone, 81 N. C. 204; Bergen vs. Stewart, 28 How.

Pr. 6; Ketler vs. Thompson, 13 Bush (Ky.) 287; Dugger vs. Wright, 51 Ark. 232; 11 S. W. 213; Powell vs. Powell, 48 Cal. 234.

^{105a} Assets Realization Co. vs. American Bonding Co. et al., 88 O. S. 216; 102 N. E. 719.

¹⁰⁶ Rudolf vs. Malone, 104 Wis. 470; 80 N. W. 743; Cobb vs. Haynes, 8 B. Mon. (Ky.) 137; Stevens vs. Tucker, 87 Ind. 109.

Bell vs. Jasper, 2 Ired. Eq. (N. C.) 597. In this case the sureties upon a guardian's bond for \$10,000 asked to be released, which was done, and a new bond of \$5,000 executed, a loss of \$4,000 having occurred while the first bond was in force, which the first sureties paid, the first sureties were allowed contribution against the second for their pro rata share of the loss.

But see Burnett vs. Millsaps, 59 Miss. 333, where it is held that the several sureties should contribute equally up to the amount of the smaller bond. To the same effect see Cherry vs. Wilson, 78 N. C. 164.

ities are limited to a part of the sum secured. But if the undertakings are for distinct parts of the debt of the principal, as distinguished from the undivided part of the whole, the promisors are not co-sureties and cannot enforce contribution.

Thus where one wishing credit for a definite amount, engaged to furnish three bonds each for an amount equal to one-third of the sum to be secured. It was considered that each bond was a distinct transaction, and not so related to the others as to enable one who paid his bond to have contribution.¹⁰⁷

If in the course of legal proceedings for the collection of a debt for which another is already bound as surety, an additional security such as a stay or appeal bond is given, the successive undertakings, although securing the same debt, do not arise out of the same transaction, and the relation of co-sureties does not exist, but the separate sets of sureties must exonerate each other in the inverse order in which they were given.¹⁰⁸

Where one of three co-sureties was given an indemnity bond by his principal against his liability as surety, and default being made, paid the full amount, and afterwards recovered the amount paid from the surety on the indemnity bond, it was held that the indemnity surety was not thereby made co-surety with other sureties on the original bond, and could not enforce contribution from them.¹⁰⁹

¹⁰⁷ Coope vs. Twynam, Turn. & Russ. 426. In this case each bond was for £400 and payable at different periods, and neither surety was liable to the creditor for any part of the debt except the particular sum described in his undertaking, although each portion of the debt was contracted for at one time, and taken together constituted an entire contract as between the debtor and creditor.

¹⁰⁸ Friberg vs. Donovan, 23 Ill. App. 58; Pott vs. Nathans, 1 Watts & Serg. (Pa.) 155; Brandenberg vs. Flynn's Executor, 12 B. Mon. (Ky.) 397; Chrisman vs. Jones, 34 Ark. 73; Rosenbaum vs. Goodman, 78

Va. 121; Dunlap vs. Foster, 7 Ala. 734.

¹⁰⁹ Gibson vs. Shehan, 5 App. D. C. 391. This case was decided upon the theory that since the indemnity surety was a Surety Company to whom a premium had been paid by the principal that the entire penalty of the bond constituted a trust fund to which the other co-sureties might resort. But if the indemnity bond had been executed by a private surety, such surety would not be entitled to have contribution with the other sureties in the original transaction, as the indemnity bond constitutes an entirely different transaction, and is not bound at all for the orig-

§264. A surety for a surety not liable in contribution.

A supplemental surety, or one who engages to answer for the default of another who has already become bound as a promisor in suretyship, is not liable to contribution, since as to such promisor the earlier surety is in the relation of a principal debtor.

This is illustrated by the ordinary cases in which two or more persons become separate and successive indorsers upon promissory notes. If they are regular indorsers in the chain of title, the last undertakes that the first shall pay, and if the first does pay the later indorsers are fully exonerated. This is because they are sureties for the earlier indorsers and not with them.

The same is true of successive accommodation indorsers in the absence of special agreement to be jointly bound.¹¹⁰

If one of several sureties stipulates with the debtor or creditor that he assumes the liability only as surety for those who precede him, he will be bound in no other way. It adds nothing to the liability of the earlier signers that another has undertaken to answer for them, and the equity of contribution is overcome by the superior legal contract right of the later promisor who signs upon such condition.¹¹¹

If the last one of a series of accommodation indorsers adds the word "surety." to his name, the others being signed in

inal debt, but merely for such sums as are coerced from a surety for the original debt.

But see *American Surety Co. vs. Boyle*, 65 O. S. 486; 63 N. E. 73, in which an apt criticism of *Gibson vs. Shehan* (ubi supra) is made, wherein the Court says, "Analysis shows that it applies a general rule to a case which is not comprehended by it because not within its reason."

¹¹⁰ *Post*, Sec. 278; *McDonald vs. McGruder*, 3 Pet. 470; *McCarty vs. Roots*, 21 How. 432.

¹¹¹ *Bulkeley vs. House*, 62 Conn. 459; 26 Atl. 352; *Mulkey vs. Templeton*, 60 S. W. (Tex. Civ. App.)

439; *Schram vs. Werner*, 85 Hun. 293; 32 N. Y. S. 995; *Hamilton vs. Johnston*, 82 Ill. 39; *Adams vs. Flanagan*, 36 Vt. 400; *Boulware vs. Hartsook*, 83 Va. 679; 3 S. E. 289; *Baldwin vs. Fleming*, 90 Ind. 177; *Hanish vs. Kennedy*, 106 Mich. 455; 64 N. W. 459; *Singer Mfg. Co. vs. Bennett*, 28 W. Va. 16.

Where a co-surety claims that his contract is anything else than what it purports to be on its face, such as that he is a surety for and not with another, the burden is on him to show such fact. *Carr vs. Smith*, 129 N. C. 232; 39 S. E. 831.

blank, the presumption arises that the last signer is surety for the others.¹¹²

In the absence of all stipulation on the instrument itself, the conditions under which the various parties sign may be shown by parol, and if a mutual understanding between the surety and either the debtor or creditor be established that the liability of co-surety is not assumed, contribution will not be enforced, even though the earlier surety had no notice of the arrangement.¹¹³

It is held that the stipulation limiting the liability to that of a surety for the prior parties is ineffectual where the prior parties contract on the condition that those who sign later shall become co-sureties.¹¹⁴

§265. Contribution as affected by special contract between sureties.

The relation between several obligors on a suretyship contract may generally be shown, and if some have agreed with the others to assume a larger liability as between themselves, it would be manifestly an anomaly in equity to permit one party to the agreement to violate his compact and assert his so called "equity" of contribution because some rule of evidence did not permit the agreement to be shown.

The right to show by parol an agreement between co-sureties, as affecting their rights and liabilities in contribution, is not covered by the Statute of Frauds. Where one surety promises his co-surety that he will respond to a larger liability than the equity of contribution would put upon him by operation of law,

¹¹² Sayles vs. Sims, 73 N. Y. 551.

In Harris vs. Warner, 13 Wend. 400, there were four sureties, the first three added the word "surety" to their names, and the last added "surety for the above names," and it was held that contribution could not be enforced against the last surety.

¹¹³ Craythorne vs. Swinbourne, 14 Ves. Jr. 160; Chapeze vs. Young, 87 Ky. 476; 9 S. W. 399; Leeper vs.

Paschal, 70 Mo. App. 117; Schram vs. Werner, 85 Hun 293; 32 N. Y. S. 995; Oldham vs. Broom, 28 O. S. 41.

¹¹⁴ Crouse vs. Wagner, 41 O. S. 470.

But see Bobbitt vs. Shryer, 70 Ind. 513; Melms vs. Werdehoff, 14 Wis. 18; Adams vs. Flanagan, 36 Vt. 400; Sherman vs. Black, 49 Vt. 198.

he in effect, promises to indemnify him against his liability as a surety for that part in excess of the amount agreed upon. Such promise of indemnity may be shown by parol.¹¹⁵

Thus where a surety upon an official bond stipulated with his co-surety that he was to be liable for only one-third of any default that should be made, and he afterwards paid one-half the default, and brought action to recover from his co-surety upon the parol agreement, the amount he had paid in excess of his agreement, it was held, "Co-sureties may by contract, agreement or understanding between themselves, limit and fix the proportion and extent of their several or correlative liability and it is competent to establish the agreement by parol."¹¹⁶

§266. Contribution between persons in the situation of a surety.

Where a liability exists to pay the debt of another and the obligation is satisfied, a right of contribution arises against all who were bound for the same duty even though the suretyship relation was involuntary. The party paying being placed in the situation of a surety, the equity of contribution arising in favor of a regular surety will apply.

In a case where brokers holding notes of their customers for sale, fraudulently pledged them for their own debt, the several owners of the notes were considered as being in the situation of sureties for the debt of their brokers, and the maker of one of the notes being called upon for payment it was held that he was entitled to contribution from the others similarly situated.¹¹⁷

¹¹⁵ *Thomas vs. Cook*, 8 Barn. & Cr. 728; *Wildes vs. Dudlow*, L. R., 19 Eq. 198; *Guild vs. Conrad*, L. R., 2 Q. B. Div. 885; *Chapin vs. Merrill*, 4 Wend., 657; *Blake vs. Cole*, 22 Pick. 97; *Horn vs. Bray*, 51 Ind. 555; *Ferrell vs. Maxwell*, 28 O. S. 383; *Barry vs. Ransom*, 12 N. Y. 462; *Baldwin vs. Fleming*, 90 Ind. 177; *Mansfield vs. Edwards*, 136 Mass. 15.

See also *Ante Sec. 32*.

¹¹⁶ *Rose vs. Wollenberg*, 31 Oregon, 269; 44 Pac. 382.

See also *Hoggatt vs. Thomas*, 35 La. Ann. 298.

Contra—*Wolverton vs. Davis*, 85 Va. 64; 6 S. E. 619.

¹¹⁷ *McRide vs. Potter-Lovell Co.*, 169 Mass. 7; 47 N. E. 242. In this case the several notes were in different sums and fell due at different

In those States where stockholders of a corporation are individually liable to assessment for the payment of corporate debts, they are thus placed in the situation of a surety, and if one stockholder pays more than his proportionate share he is entitled to contribution from the others.¹¹⁸

§267. One who becomes surety at the request of a co-surety is liable in contribution to such co-surety.

It has been held that if one becomes surety at the request of a co-surety, the latter will be presumed to make the request in furtherance of a purpose of his own, and a promise of indemnity to him will be implied.

In an early case Lord Kenyon assumed it to be beyond question that a surety signing upon invitation of his co-surety is exempt from contribution, stating his view thus: "I have no doubt that where two parties become joint sureties for a third person, if one is called upon and forced to pay the whole of the money, he has a right to call on his co-surety for contribution; but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretense

times. *Allen, J.*: "These differences do not vary the equitable rights and liabilities of the parties as amongst themselves. The liability to contribute does not depend on a contract between the parties who are held liable to contribute, and is not affected by the fact that notes were pledged and fell due and were paid at different times, or that some of them were paid only in part or not at all. The notes were all pledged to secure the same indebtedness. The fact that some of them fell due at earlier dates than others creates no equity in favor of those which fell due last. The various parties selected a common agent, and this agent used its power to place them all under a common li-

ability, thus making them all sureties for itself. It might be that under such circumstances the pledgee would prefer to hold one and exonerate another, and it would have power to do so in the first instance by proceeding to collect of one, but not of another. But where several different parties have thus been exposed to loss by the fraud of their common agent, it is more equitable that the burden of the loss should be shared *pro rata*. Under such circumstances equality is equity, without respect to the times of the maturity of the notes."

¹¹⁸ *Umsted vs. Buskirk*, 17 O. S. 114; *Buchanan vs. Meisser*, 105 Ill. 638; *Wolters vs. Henningsan*, 114 Cal. 433; 46 Pac. 277.

for saying that he shall be liable to be called upon by the person at whose request he entered into the security.”¹¹⁹

In nearly all the cases usually cited in support of the rule stated by Lord Kenyon the surety signing at the request of his co-surety was also indemnified, either by the written or verbal promise of the co-surety,¹²⁰ and this circumstance alone would prevent the one furnishing the indemnity from enforcing contribution.

Unless there is some agreement or understanding to the contrary the fact that one becomes surety at the request of a co-surety does not appear to furnish any reason for depriving the co-surety of contribution.

“If a surety making the request, receive any personal benefit from the execution of the obligation — as where the money raised thereon goes into his hands, or where he has already incurred a liability upon an instrument completed by delivery — we can see a propriety in the court treating the person thus benefited and making the request, as a principal, and the person signing at such request as his surety only and not liable to contribute for his benefit. So, where the signature is upon an express contract to indemnify, the consideration supports the promise and discharges the surety from the legal obligation otherwise resting upon him. But where parties standing in an equal relation to the principal sign as sureties for that principal, the one at the request of the other, we are not satisfied that any sound principle of law or equity will discharge either from the legal obligation he assumes on the face of the instrument to contribute his proportion on default of the chief obligor.”¹²¹

¹¹⁹ *Turner vs. Davies*, 2 Esp. 478; *Cutter vs. Emery*, 37 N. H. 567; *Daniel vs. Ballard*, 2 Dana (Ky.) 296.

¹²⁰ *Thomas vs. Cook*, 8 Barn. & Cr. 728; *Apgar vs. Hiller*, 4 Zab. (N. J.) 812; *Harris vs. Brooks*, 21 Pick. 195.

¹²¹ *Bagott vs. Mullen*, 32 Ind. 332; *McKee vs. Campbell*, 27 Mich. 497; *Burnett vs. Millsaps*, 59 Miss. 333; *Shuford vs. Cook*, 80 S. E. 61.

But see *Hendrick vs. Whittemore*, 105 Mass. 23. Where the court approves the charge of the lower court which was: “If the jury were satisfied that the defendant signed the bond as surety, at the request of or being induced thereto by the plaintiff, then the plaintiff could not recover, but if he signed at the request of the principal, though the request of the plaintiff was coupled with it,

§268. One who aids in the commission of the default is barred from the right of contribution.

The proposition is self-evident that where one of two or more obligors in suretyship aids in the commission of a default by the principal, either by his negligence or his active misconduct, he cannot assert a claim in contribution.

Where the plaintiff and another were co-sureties of an administrator and the action was to recover in contribution for losses paid by the plaintiff resulting from the failure of a bank in which trust funds were deposited, it was held that the plaintiff could not recover, it being shown that the plaintiff as the attorney of the administrator made the deposit, and although acting in good faith, yet as it was his own act which caused the loss, he could not claim that the defendant owed him any duty to contribute.¹²²

It was held that where a deputy sheriff was a surety upon the bond of the sheriff and recovery was had upon the bond of the latter for the wrongful act of the deputy, that no recovery in contribution could be had by the deputy.¹²³

The misconduct of the surety which deprives him of contribution must be something more than a mere moral delinquency. The rule covers only such conduct as amounts to participation in the act which causes the loss. If the surety by his example or by his own solicitation leads the principal into habits of vice, which finally cause the principal to make default, the agency of the surety is too remote to deprive him of contribution.

In the early case of *Deering vs. Winchelsea*¹²⁴ heretofore considered¹²⁵ it was claimed that the plaintiff seeking contribution had encouraged the principal in his irregularities by engaging with him in gaming and other extravagances which led to his

that would not be defense in this action."

¹²² *Eshleman vs. Bolenius*, 144 Pa. 269; 22 Atl. 758.

¹²³ *Block vs. Estes*, 92 Mo. 318; 4 S. W. 731.

See also *Seofield vs. Gaskill*, 60

Ga. 277; *Simmons vs. Camp*, 71 Ga. 54; *Pile vs. McCoy*, 99 Tenn. 367; 41 S. W. 1052.

But see *Shepard vs. Pebbles*, 38 Wis. 373.

¹²⁴ 2 B. & P. 270.

¹²⁵ Ante Sec. 262.

ruin, and the Court observed: "If these were circumstances which could work a disability in the Plaintiff to support his demand, it must be on the maxim, 'that a man must come into a court of Equity with clean hands'; but general depravity is not sufficient. It must be pointed to the act upon which the loss arises, and must be in a *legal* sense the cause of the loss. In a *moral* sense Sir E. Deering might be the author of the loss; but in a *legal* sense Thomas Deering was the author; and if the evil example of Sir E. Deering led him to it, yet this was not what a court of justice could take cognizance of."

§269. When contribution may be enforced.

No right of contribution arises in favor of a co-surety who pays no more than his ratable share of the common burden.

If one of two sureties pays one-half of the debt, he cannot call upon his co-surety to contribute to him even though his co-surety pays nothing to the creditor. If the latter sees fit not to enforce his demand against one of the sureties, it is no injury to the other.¹²⁶

To permit a co-surety to have contribution for each installment as he pays it, without regard to the amount of his share of

¹²⁶ *Davies vs. Humphries*, 6 M. & W. 153, *Parke, B.*: "If a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who might himself subsequently pay an equal and greater portion of the debt; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that, he has no equity to receive a contribution, and consequent-

ly no right of action, which is founded on the equity to receive it."

See also *Wallis vs. Swinburne*, 1 Welsb. H. & G. 203; *Ex parte Snowden*, 17 Ch. Div. 44; *Morgan vs. Smith*, 70 N. Y. 537; *Camp vs. Bostwick*, 20 O. S. 337; *Smith vs. State*, 46 Md. 617; *Pegram vs. Riley*, 88 Ala. 399; 6 South. 753; *Washington vs. Norwood*, 128 Ala. 383; 30 South. 405; *Weidemeyer vs. Landon*, 66 Mo. App. 520; *Durbin vs. Kuney*, 19 Oregon 71; 23 Pac. 661; *Glasscock vs. Hamilton*, 62 Tex. 143; *Bushnell vs. Bushnell*, 77 Wis. 435; 46 N. W. 442; *Backus vs. Coyne*, 45 Mich. 584; 8 N. W. 694; *Gordon vs. Rixey*, 86 Va. 853; 11 S. E. 562.

the entire debt, would be a great inconvenience and result in a multiplicity of suits.^{126a}

If the payment by a surety of less than his moiety extinguishes the entire debt, the sum so paid represents the common burden and contribution arises.¹²⁷

The act of payment fixes the right of recovery in contribution and a demand and notice are not required as a basis of an action against the co-surety.¹²⁸

Payment may be made by the note of the surety, and the acceptance of the note as payment by the creditor gives immediate right of contribution, and the right may be enforced even though the note is unpaid,¹²⁹ and even though the maker of the note is insolvent.¹³⁰

Where a surety executed and delivered his note to the creditor and thereafter the creditor through motives of friendship cancelled it and returned it to him without payment, it was held that recovery in contribution might be had against his co-surety.¹³¹

It has been held that contribution can not be enforced against a co-surety, except where the surety paying is unable to recover from the principal by reason of the insolvency of the latter.¹³² But the general rule is that contribution may be enforced without regard to the financial condition of the principal.¹³³

^{126a} *Stirling vs. Burdett*, 2 Ch. 418.

¹²⁷ *Stallworth vs. Preslar*, 34 Ala. 505; *Boutin vs. Estell*, 110 Wis. 276; 85 N. W. 964.

¹²⁸ *Mason vs. Pierron*, 69 Wis. 585; 34 N. W. 921; *Vliet vs. Wyckoff*, 42 N. J. Eq. 642; 9 Atl. 679; *Parham vs. Green*, 64 N. C. 436.

It was held in *Neilson vs. Fry*, 16 O. S. 552, that the plaintiff can not recover costs in contribution unless the co-surety is notified of the amount paid for his account with a demand for payment.

¹²⁹ *Smith vs. Mason*, 44 Neb. 610; 63 N. W. 41.

See also *Sloan vs. Gibbes*, 56 S. C.

480; 35 S. E. 408; *Ryan vs. Krusor*, 76 Mo. App. 496; *Nixon vs. Beard*, 111 Ind. 137; 12 N. E. 131.

Contra—*Brisendine vs. Martin*, 1 Ired. Law (N. C.) 286.

¹³⁰ *Owen vs. McGehee*, 61 Ala. 440.

¹³¹ *Stubbins vs. Mitchell*, 82 Ky. 535.

¹³² *Morrison vs. Poyntz*, 7 Dana (Ky.) 307; *Poignard vs. Vernon*, 1 T. B. Mon. (Ky.) 45; *Glasscock vs. Hamilton*, 62 Tex. 143; *Hall vs. Gleason*, 158 Ky. 789.

¹³³ *Mosely vs. Fullerton*, 59 Mo. App. 143; *Smith vs. Mason*, 44 Neb. 610; 63 N. W. 41; *Taylor vs. Reynolds*, 53 Cal. 686; *Sloo vs. Pool*, 15 Ill. 47; *Buckner vs. Stewart*, 34

§270. Equitable contribution — or the right of a surety to call upon his co-surety for exoneration before payment.

The doctrine that a surety cannot enforce contribution until he has first paid more than his own proportion of the debt must yield to the superior equities of exceptional cases.

If one of several co-obligors is called upon to pay the entire debt it will sometimes occur that a compliance with this demand would cause financial disaster to him, which his right of contribution *after payment* would not prevent.

This contingency has been stated thus: "Obviously if a man were surety with nine others for £10,000, it might be a ruinous hardship if he were compelled to raise the whole £10,000 at once and perhaps to pay interest on the £9,000 until he could recover the £9,000 by actions or debtor summonses against his co-sureties." ¹³⁴

It is clear that some form of equitable contribution, without requiring payment to be first made, is necessary to meet such cases. This is ordinarily accomplished by a bill in equity, brought by the surety called upon for the entire debt, directed against his co-surety, praying for an order requiring the co-surety to pay to the creditor his contributory share of the common burden. Such procedure enables one who is entitled to contribution and indemnity from his co-obligor to prevent loss and perhaps ruin, and is a reasonable expression of the highest equity. ¹³⁵

Ala. 529; Goodall vs. Wentworth, 20 Me. 322; Rankin vs. Collins, 50 Ind. 158; Boutin vs. Etsell, 110 Wis. 276; 85 N. W. 964.

¹³⁴ Wolmershausen vs. Gullick, L. R., 2 Ch. Div. (1893) 514.

¹³⁵ In the case of Wolmershausen vs. Gullick (*ubi supra*) demand was made upon one of five sureties for the payment of the entire debt, which was a large sum, and the bill alleges that if the plaintiff were obliged to withdraw so large an amount from her business that the

business would be greatly embarrassed, that she was willing to pay her proportion, and asks for an order requiring the co-sureties to pay to the creditor their respective shares. The Court granted the relief, stating: "I think that I can declare the Plaintiff's right, and make a prospective order under which, whenever she has paid any sum beyond her share, she can get it back, and I therefore declare the Plaintiff's right to contribution, and direct that, upon the Plaintiff pay-

The surety may also have equitable contribution enforced where the co-surety is about to make a fraudulent conveyance of his property. Under these circumstances it would be a manifest hardship against the surety to require him to first adjust his liability to the creditor before taking steps to restrain the fraudulent act of his co-surety.¹³⁶

§271. Amount recoverable in contribution.

In addition to the contributory share of the debt, the surety who is called upon for payment by the creditor may recover from his co-surety his share of the costs of the litigation instituted by the creditor in establishing the amount due,¹³⁷ and other expenses incurred in a defense of the claim undertaken in good faith, such as counsel fees.¹³⁸

The surety paying the contributory share of his co-surety is entitled also to recover interest on the amount paid.¹³⁹

Contribution can be had only for the amount actually paid with interest and expenses, and if the surety pays in property of less value than the amount of the debt,¹⁴⁰ or buys up the claims against the debtor for less than their face value,¹⁴¹ he must settle with his co-sureties on the same basis.

ing her own share, the Defendant Gullick is to indemnify her against further payment or liability, and is, by payment to her or to the principal creditor or otherwise, to exonerate the Plaintiff from liability beyond the extent of her own share."

See also *Hodgson vs. Baldwin*, 65 Ill. 532; *Hyde vs. Tracy*, 2 Day (Conn.) 491; *Ferrer vs. Barrett*, 4 Jones Eq. (N. C.) 455.

Post Sec. 281.

¹³⁶ *Bowen vs. Hoskins*, 45 Miss. 183; *Smith vs. Rumsey*, 33 Mich. 183; *Pashby vs. Mandigo*, 42 Mich. 172; 3 N. W. 927.

¹³⁷ *Security Ins. Co. vs. St. Paul Ins. Co.*, 50 Conn. 233; *Marsh vs. Harrington*, 18 Vt. 150; *Bright vs. Lennon*, 83 N. C. 183; *Gross vs. Davis*, 87 Tenn. 226; 11 S. W. 92;

Wagenseller vs. Prettyman, 7 Ill. App. 192; *McKee vs. Campbell*, 27 Mich. 497; *Kemp vs. Tinden*, 12 M. & W. 421.

¹³⁸ *Boutin vs. Etsell*, 110 Wis. 276; 85 N. W. 964; *Van Winkle vs. Johnson*, 11 Oreg. 469; 5 Pac. 922;

Gross vs. Davis, 87 Tenn. 226; 11 S. W. 92.

¹³⁹ *Lawson vs. Wright*, 1 Cox 275; *Ex parte Bishop*, 15 Ch. Div. 400; *Buckmaster vs. Grundy*, 8 Ill. 626; *Smith vs. Mason*, 44 Neb. 610; 63 N. W. 41; *Backus vs. Coyne*, 45 Mich. 584; 8 N. W. 694.

¹⁴⁰ *Jones vs. Bradford*, 25 Ind. 305; *Edmonds vs. Shcahan*, 47 Tex. 443.

¹⁴¹ *Derosset vs. Bradley*, 63 N. C. 17; *Tarr vs. Ravenscroft*, 12 Gratt. 642.

§272. Contribution as affected by the insolvency of one or more co-sureties.

In determining the amount which each co-surety should contribute, those who are insolvent will be excluded, and the burden divided among those who are solvent.

There would seem to be no reason why this rule, if applied at all, should not have equal force whether the action for contribution arises at law or in equity. In either forum the remedy of contribution is enforced upon the theory that equity will not permit one to be charged with a greater share of a common burden than his co-obligors.

It has, however, been held in some jurisdictions that the insolvent co-surety will be excluded only when the action for contribution is brought in equity.¹⁴² But the generally accepted rule is that the inherent equities of the doctrine of contribution will be as fully administered at law as in equity, and that the insolvent surety will be excluded from the calculation.¹⁴³

§273. Contribution as affected by absence from the jurisdiction or by the death of a co-surety.

All solvent co-sureties within the jurisdiction in which an equitable action for contribution is brought must be joined as

¹⁴² Moore vs. Bruner, 31 Ill. App. 400; Gross vs. Davis, 87 Tenn. 226; 11 S. W. 92; Acers vs. Curtis, 68 Tex. 423; 4 S. W. 551; Trego vs. Estate of Cunningham, 267 Ill. 367; 108 N. E. 350.

¹⁴³ Burroughs vs. Lott, 19 Cal. 125; Newton vs. Pence, 10 Ind. App. 672; 38 N. E. 484; Sloan vs. Gibbes, 56 S. C. 480; 35 S. E. 408; Liddell vs. Wiswell, 59 Vt. 365; 8 Atl. 680.

Smith vs. Mason, 44 Neb. 610; 63 N. W. 41, *Norval, C. J.*: "Ordinarily, where one of several sureties, who are equally bound, pays the debt, he is entitled to recover as contribution from the solvent sureties a *pro rata* share of the amount so paid, with interest. There are

some cases which hold that in an action for contribution the question of the solvency or insolvency of the co-sureties is not material, but that the one paying the debt is entitled to recover contribution without regard to the insolvency of any of them. The better and the more equitable rule, one supported by the weight of authority, and which we think should obtain, is that contribution must be based upon the number of solvent co-sureties. In other words, the insolvent ones are to be excluded, and the burden must be distributed between those who are solvent."

defendants.¹⁴⁴ But if some are absent from the jurisdiction it does not constitute a bar to an action against the others, and those absent will be excluded, and the entire burden distributed among the ones remaining.¹⁴⁵

A surety in whose favor the statute of limitations has not run, who has done nothing to suspend its operation, and who has been compelled to pay the debt of his principal may exact contribution from a co-surety in another state, though under the laws thereof the creditor's claim against the latter was barred when the principal's debt was paid.^{145a}

If a co-surety dies, the obligation to contribute devolves upon his legal representatives. In this respect it is like any other contract to pay money at a future time upon a contingency, and it is not necessary that the breach should occur before the promisor dies.¹⁴⁶

If the estate has been administered, and the assets distributed to the heirs before the cause of action in contribution arises, the contributory share of the decedent may be recovered from the heirs.¹⁴⁷

§274. Surety seeking contribution must account to his co-sureties for indemnity furnished him by the principal.

If a surety receives indemnity from the principal he holds it in trust for the equal benefit of all the co-sureties, and their pro rata share of the indemnity, if the indemnity has been reduced to money, must be deducted from their prospective liabilities before recovery can be had in contribution, or if the

¹⁴⁴ Johnson vs. Vaughn, 65 Ill. 425; Adams vs. Hayes, 120 N. C. 383; 27 S. E. 47; Bruce vs. Bickerton, 18 W. Va. 342; Young vs. Lyons, 8 Gill (Md.) 162.

Because of the fact that the liability of co-sureties is considered several rather than joint, a technical objection to a joinder would arise if the action is brought at law, except where the code provides for joining as defendants all persons having an interest in the controversy. Daum vs. Kehnast, 18 O. C. C. 1.

¹⁴⁵ Security Ins. Co. vs. St. Paul Ins. Co., 50 Conn. 233; Faurot vs. Gates, 86 Wis. 569; 57 N. W. 294; Stewart vs. Goulden, 52 Mich. 143; 17 N. W. 731; Currier vs. Baker, 51 N. H. 613; Liddell vs. Wiswell, 59 Vt. 365; 8 Atl. 680.

^{145a} Frew vs. Scoular, 101 Neb. 131; 162 N. W. 496; Ann. Cases 1918E, 511, note.

¹⁴⁶ Bachelder vs. Fiske, 17 Mass. 464; Johnson vs. Harvey, 84 N. Y. 363; Egbert vs. Hanson, 70 N. Y. S. 383; Tarr vs. Ravenscroft, 12 Gratt. 642; Handley vs. Hefin, 84 Ala. 600; 4 South. 725; Conover vs. Hill, 76 Ill. 342; Sanders vs. Weelburg, 107 Ind. 266; 7 N. E. 573; Hecht vs. Skaggs, 53 Ark. 291; 13 S. W. 930; Pace vs. Pace, 95 Va. 792; 30 S. E. 361.

¹⁴⁷ Stevens vs. Tucker, 87 Ind. 109; Williams vs. Ewing, 31 Ark. 229; Gibson vs. Mitchell, 16 Fla. 519.

See also Zollickoffer vs. Seth, 44 Md. 359.

value of the indemnity has not been established before contribution is enforced, the co-sureties may recover back from the indemnified surety their proportionate share, as it shall be finally ascertained.

In a well considered English case two of four sureties were indemnified by a bill of sale of personal property. They paid the debt, and their co-sureties contributed in equal proportions and afterwards brought suit to recover their share of the indemnity. The plaintiffs had no knowledge of the indemnity at the time they signed, and the bill of sale to the defendants contained the stipulation that the indemnity was exclusively for the defendants, and that the plaintiffs should not have the benefit of the security or any part of it; the court held the plaintiffs were entitled to the relief sued for.¹⁴⁸

Indemnity in the hands of one co-surety will inure to the benefit of other sureties who make their contract at a later period, as where a public officer gives an additional bond as required by law, the last sureties if sued in contribution will

¹⁴⁸ *Steel vs. Dixon*, 17 Ch. Div. (1881) 825, *Fry, J.*: "In my opinion the Plaintiffs are entitled to share in the benefit secured by the deed of the Defendants. In coming to that conclusion, I base myself on the general principle applicable to co-sureties, as established by the well-known and often-cited case of *Deering vs. Earl of Winchelsea*, the short effect of which I take to be that, as between co-sureties, there is to be equality of the burden and of the benefit. . . . If that be the case, it follows that each surety must bring into hotchpot every benefit which he has received in respect of the suretyship which he undertook, and if he has received a benefit by way of indemnity from the principal debtor, it appears to me that he is bound, as between himself

and his co-sureties, to bring that into hotchpot, in order that it may be ascertained what is the ultimate burden which the co-sureties have to bear, so that that ultimate burden may be distributed between them, equally or proportionably, as the case may require."

See also *Berridge vs. Berridge*, 44 Ch. Div. 168; *Vandiver vs. Pollak*, 107 Ala. 547; 19 South. 180; *Simmons vs. Camp*, 71 Ga. 54; *Keiser vs. Beam*, 117 Ind. 31; 19 N. E. 534; *Neely vs. Bee*, 32 W. Va. 519; 9 S. E. 898; *Barge vs. Van Der Horck*, 57 Minn. 497; 59 N. W. 630; *Hoover vs. Mowrer*, 84 Iowa 43; 50 N. W. 62; *Fuller vs. Hapgood*, 39 Vt. 617; *Teeter vs. Pierce*, 11 B. Mon. 399; *Scribner vs. Adams*, 73 Me. 541; *Smith vs. Conrad*, 15 La. Ann. 579; *Baber vs. Hanic*, 163 N. C. 588; 80 S. E. 57.

be entitled to have credited to them a share in the indemnity furnished the earlier sureties.¹⁴⁹

If one is surety for several debts of the same principal and holds indemnity for his liability, each of the several sets of co-sureties are entitled to off-set a pro rata share of the indemnity against a claim for contribution.¹⁵⁰

The fact that the surety paying owes the principal does not put him in the situation of one holding indemnity, and constitutes no defense to an action for contribution.¹⁵¹

Where one or more sureties have been indemnified, and the indemnity furnished is released or restored to the principal, it will constitute a defense to the action of such surety for contribution to the extent of the ascertained value of the security.¹⁵² The same rule applies if the surety by his negligence causes the indemnity to be lost or wasted.¹⁵³

Where judgment was entered against the principal for the debt, and one co-surety became the purchaser of property of the principal taken in execution to satisfy such judgment, it was held that in an action for contribution he must account to

¹⁴⁹ *Farmers Bank vs. Teeters*, 31 O. S. 36.

¹⁵⁰ *Mueller vs. Barge*, 54 Minn. 314; 56 N. W. 36; *Brown vs. Ray*, 18 N. H. 102.

See also *Wilson vs. Stewart*, 24 O. S. 504. In this case a surety held a mortgage of indemnity to secure him against loss by reason of his suretyship in several transactions, in each of which he had co-sureties. He applied a part of the indemnity in full settlement of one debt, thus completely exonerating his co-sureties in that transaction, and the balance of the indemnity he applied pro rata upon the other debts. The co-sureties upon the debts not settled in full, paid the deficiency, and recovered from the indemnified surety so much of the indemnity as was in

excess of the proportion properly applicable to the debt which had been paid in full, and it was held that the surety who was thus called upon to refund his indemnity, might recover in contribution from the co-surety who was exonerated by the original application of the indemnity.

Contra—*Titcomb vs. McAllister*, 81 Me. 399; 17 Atl. 315.

¹⁵¹ *Davis vs. Toulmin*, 77 N. Y. 280.

But see *Bezzell vs. White*, 13 Ala. 422.

¹⁵² *Paulin vs. Kaighn*, 29 N. J. L. 480.

¹⁵³ *Steele vs. Mealing*, 24 Ala. 285; *Frink vs. Peabody*, 26 Ill. App. 390; *Chilton vs. Chapman*, 13 Mo. 470.

his co-sureties for the real value of the property without regard to the price at which he had bid it in at the execution sale.¹⁵⁴

The surety is not barred from his remedy in contribution merely by the fact that he holds security,¹⁵⁵ and there can be

¹⁵⁴ Sanders vs. Weelburg, 107 Ind. 266; 7 N. E. 573, *Howk, C. J.*: "It is claimed on behalf of the appellant, that he purchased the property of the principal in the judgment, at public sales thereof by the sheriff of the county, where all parties, the appellee included, had the right to appear and bid therefor; that he had the lawful right to purchase such property, at such sales, and as no one would or did bid more therefor than he, to purchase the same at and for the amount of his several bids, without regard to the actual value thereof; and that, having so purchased such property, he cannot be required to account therefor even to the appellee, as his co-surety, at its actual value, or at any greater value than the aggregate amount of his several bids. . . . Appellant, having fully paid and satisfied the judgment to the judgment creditor or plaintiff, by means of such payment, acquired at the time a cause of action against the appellee, as his co-surety in such judgment; but in his suit on such cause of action, it is clear, we think, that under our law he could not recover of the appellee any more than she was 'equitably bound to pay.' *Prima facie*, appellee as the co-surety of appellant was liable to him for one-half of the sum paid by him to the judgment plaintiff, in satisfaction of such judgment; but this *prima facie* liability was subject to reduction by whatever sum could be realized from the property of the principal in such judgment. The property of the prin-

cipal in the judgment was a common fund for the benefit and protection of both the sureties alike, the appellee as well as the appellant. . . . We do not decide, in this case, that appellant did not have the right to sue out execution on the judgment, and procure the sale by the sheriff of the principal's property; for this right he clearly had. What we do decide is that if the appellant, at such sales, purchased the property of the principal, at comparatively nominal prices, and then sued his co-surety for contribution, she had the right, in bar of such suit, to show, as she did, that such property, at its fair value, was more than sufficient to satisfy such judgment." But see *Elrod vs. Gastineau*, 124 Ky. 609; 99 S. W. 903.

¹⁵⁵ *Williams vs. Riehl*, 127 Cal. 365; 59 Pac. 762, *Cooper, C.*: "Why should the plaintiff, in an action for contribution, after having paid out his money, be compelled to wait until he can realize upon some collateral indemnity which may require years, while his co-surety, who was as much bound in law and morals as himself by the bond, has paid nothing? This would not make the burdens of the co-sureties equal. The indemnity is for the benefit of one co-surety as much as for the other, no matter which holds it. Either one could apply to the court for its sale, or to enjoin a wrongful disposition of it. The burden of finding a market for it and applying its value toward the debt of the principal should be borne by one as well as the other. There is no reason why

no off-set on account of the indemnity unless its value is ascertained, either by reducing it to money or otherwise.

Where the surety has indemnity to secure his liability in suretyship and also to secure a debt owing him by the principal, the equity of his co-sureties in the indemnity is superior, and he cannot apply the security to his own debt without releasing his claim for contribution.¹⁵⁶

§275. Surety may enforce contribution even though payment by him was without compulsion.

Whenever the debt matures a surety may pay the same and enforce contribution, even though no demand is made upon him by the creditor. It is not necessary to wait for the liability to be fixed by judgment, nor for suit to be started or threatened.

If a breach of the principal contract has occurred so that action might be maintained on the suretyship undertaking, a payment by the surety or guarantor is not voluntary.¹⁵⁷

But if the surety paying might have successfully resisted the claim, the payment must be considered voluntary, and contribution will not be allowed. Thus where a judgment creditor was enjoined from levying execution upon the property of a stranger to the judgment, and after dissolution the surety upon the injunction bond paid the judgment without any adjudication against himself, it was held that the payment was voluntary, and that he could not recover contribution from his co-sureties as there was no liability on the bond to pay the judgment, but

the co-surety who has paid the debt of his principal should assume the burden of disposing of the indemnity, and the additional burden of waiting until it is disposed of, before he can receive from his co-surety his proportion."

Mosely vs. Fullerton, 59 Mo. App. 143; *Johnson vs. Vaughn*, 65 Ill. 425.

But see *Morrison vs. Taylor*, 21 Ala. 779.

¹⁵⁶ *Sherman vs. Foster*, 158 N.

Y. 587; 53 N. E. 504; *Labbe vs. Bernardy*, 196 Ind. 551; 62 N. E. 688.

But see *Sanders vs. Weitermark*, 20 Tex. Civ. App. 175; 49 S. W. 900.

¹⁵⁷ *Martin vs. Ellerbe's Admr.*, 70 Ala. 326; *Bradley vs. Burwell*, 3 Denio (N. Y.) 61; *Hichborn vs. Fletcher*, 66 Me. 209; *Skrainka vs. Rohan*, 18 Mo. App. 341; *Hardell vs. Carroll*, 90 Wis. 350; 63 N. W. 275; *Glasscock vs. Hamilton*, 62 Tex. 143.

Contra—*Stockmeyer vs. Oertling* 35 La. Ann. 467.

merely to respond in damages if it should turn out that the property sought to be reached in execution was the property of the judgment debtor.¹⁵⁸

So also if the claim against the surety is barred by the statute of limitations, its payment will be voluntary, and recovery cannot be had in contribution against the co-surety.¹⁵⁹

If one surety pays a note which is void on account of usury he cannot recover contribution.¹⁶⁰

Where a surety pays to prevent a default by the principal, he cannot thereafter recover from his co-sureties in contribution. Such voluntary payment extinguishes the principal contract and prevents the occurrence of the condition which fixes a liability upon the sureties.¹⁶¹

¹⁵⁸ Halsey vs. Murray, 112 Ala. 185; 20 South. 575.

See also Nixon vs. Beard, 111 Ind. 137; 12 N. E. 131.

¹⁵⁹ Dussol vs. Bruguere, 50 Cal. 456; Machado vs. Fernandez, 74 Cal. 362; 16 Pac. 19; Hatchett vs. Pegram, 21 La. Ann. 722; Turner vs. Thom, 89 Va. 745; 17 S. E. 323; Hooper vs. Hooper, 81 Md. 155; 31 Atl. 508; Godfrey vs. Rice, 59 Me. 308; Green vs. Milbank, 56 How. Pr. 382; Gronna vs. Goldammer, 26 N. D. 122; 143 N. W. 394.

But see Jones vs. Blanton, 6 Ired. Eq. (N. C.) 115.

Bright vs. Lennon, 83 N. C. 183. Holding that a surety is not barred from contribution by failure to plead the statute of limitations.

It is also held that a surety may waive a defense, such as the alteration of the principal contract, without impairing his right of contribution. Houck vs. Graham, 106 Ind. 195; 6 N. E. 594.

¹⁶⁰ Russell vs. Failor, 1 O. S. 327. In this case the surety paying had knowledge of the usury but the decision does not appear to turn upon that fact.

But see Warner vs. Morrison, 3

Allen, 566, *Bigelow, J.*: "It does not appear that the plaintiff had knowledge that there was any usurious and corrupt agreement between the payee of the note and the principals. Without such knowledge he could make no defense. If the holder of the note had sued him, he could not have successfully resisted his liability for the balance due upon it, unless he knew that a forfeiture of part of the debt had been incurred by usury. His voluntary payment of the note after its maturity was therefore in compliance with the terms of the contract into which he had entered, and creates a valid claim for contribution. A surety having no defense, is bound to pay the debt. He is not obliged to incur the costs of defending an action. If he does, he cannot recover such costs of his co-surety, unless authorized by him to make a defense to the suit."

¹⁶¹ Ladd vs. Chamber of Commerce, 37 Oreg. 49; 60 Pac. 713; 61 Pac. 1127; 62 Pac. 208. A loan of a large sum was made by The Chamber of Commerce of Portland to enable it to erect a building; thirteen

Where one obligor pays the debt before maturity at the re-

members of the organization guaranteed the repayment of the loan in the form of a bond to the creditor conditioned that the building would be completed according to plans, and all liens and other claims paid, and a sinking fund created and maintained sufficient to retire the loan as it matured. To prevent default in the terms of this bond certain of the sureties advanced money borrowed from banks on their personal indorsement, and thereafter brought this action in contribution against the other co-sureties.

Bean, J. "The agreement of the sureties is, in legal effect, to pay to the insurance company such damages as it might sustain in case of a breach thereof by their principal. They did not obligate themselves to perform such conditions. That was a contract and duty of the principal alone, and the sureties were only liable to the obligee in case it failed to perform them. . . . Their liability was to the insurance company alone, and there is neither allegation nor proof that it ever made or had any claim for damages under the bond. But it is argued a breach of the bond and consequent damages to the insurance company would have occurred if certain of the sureties had not pledged their individual credit for money with which to complete the building. . . . The finance committee, composed principally of sureties on the bond, seems to have voluntarily borrowed the money, and paid the obligations of the Chamber of Commerce upon their own responsibility, and without consulting the principal. But, assuming that, if they had not done so, there would have been a breach of

the bond, it does not follow that the action of a part of the sureties in borrowing money for the Chamber of Commerce to use in the construction of the building would bind a non-participating surety. The borrowing sureties could determine for themselves the necessity or desirability of doing so, but they had no authority to determine that question for Hughes, and bind him by their acts. There was no agreement between the sureties by or under which such authority was granted, nor anything in the bond authorizing one surety to act in this regard for another, or the majority for all. Each surety had a right to stand upon the letter of his contract, and, in case of a breach or threatened breach of the bond, to exercise his own judgment as to whether it was better for him to suffer default and answer in damages to the obligee in the bond, or to become liable on a new obligation. His co-sureties could not determine that question for him. . . . There is no contractual relation between sureties enabling one to discharge a common obligation at his own pleasure and in his own way, and thereby bind the other. . . . Now, in this case, there was no breach of the bond, and no claim for damages thereunder was ever made by the insurance company. Had a claim matured on the bond in favor of the insurance company, and been paid by part of the sureties, they might, perhaps, compel contribution from the non-paying sureties without the recovery of a judgment for breach of the bond, by making it appear that they had no means of preventing a judgment against them. But they could not voluntarily bor-

quest of his co-obligor he may have contribution,¹⁶² but if the agreement has been made between co-sureties to pay in certain proportions, and thereafter one pays the whole, it is held that the one paying is not entitled to contribution.¹⁶³

Judgment against one surety is *prima facie* evidence of default by the principal, as against the co-surety liable in contribution,¹⁶⁴ but not conclusive.¹⁶⁵

§276. Contribution as affected by the release of one of several co-sureties.

If the creditor releases one co-promisor in suretyship the remaining promisors may claim their discharge to the extent of the contributory share of the one released.¹⁶⁶ But it is held that if the remaining surety pays the entire debt, waiving the discharge which he might claim by reason of the act of the creditor, that he may enforce contribution against the one released by the creditor.¹⁶⁷

If a surety releases one of his co-sureties from his liability to contribute, the aliquot part of the surety released cannot be recovered from the remaining obligors, but in all other respects his right of contribution is unaffected.¹⁶⁸

The fact that the creditor failed to recover against one co-surety in a joint action against both sureties does not bar the surety who was compelled to pay from enforcing contribution from the one against whom the creditor failed to recover.¹⁶⁹

row money for their principal, and bind a non-participating surety." *Fales vs. McDonald*, 79 Atl. 969.

But see *Bottoms vs. Leonards*, 21 Ky. L. Rep. 862; 53 S. W. 273; *Hotham vs. Berry*, 82 Kan. 412; 108 Pac. 801; *Guckenheimer & Bros. Co. vs. Kann*, 89 Atl. 807.

¹⁶² *Golsen vs. Brand*, 75 Ill. 148.

¹⁶³ *Curtis vs. Parks*, 55 Cal. 106.

¹⁶⁴ *Breckinridge vs. Taylor*, 5 Dana (Ky.) 110.

¹⁶⁵ *Kramph vs. Hatz*, 52 Pa. 525; *Cathcart vs. Foulke*, 13 Mo. 561; *Briggs vs. Boyd*, 37 Vt. 534; *Babcock vs. Carter*, 117 Ala. 575; 23 South. 487.

¹⁶⁶ Ante Sec. 114.

¹⁶⁷ *Hill vs. Morse*, 61 Me. 541; *Clapp vs. Rice*, 15 Gray 557.

¹⁶⁸ *Currier vs. Baker*, 51 N. H. 613; *Murphy vs. Gage*, 21 S. W. (Tex. Civ. App.) 396.

¹⁶⁹ *Koelsch vs. Mixer*, Admr., 52 O. S. 207; 39 N. E. 417. This case arose upon a bond of a treasurer. In a joint action against the sureties judgment was had against one but in favor of the other. The one recovered against paid the judgment and brought this action in contribution against the other.

Where one co-promisor is released as to the creditor by operation of law, such as a discharge by the statute of limitations, if the remaining obligors are bound, and pay the debt, they may recover in contribution from the one against whom the creditor is barred.¹⁷⁰

§277. Bankruptcy of a surety — Effect on co-surety's right of contribution.

The National Bankruptcy Act of 1898 makes no direct provision respecting the contingent liability of a co-surety for contribution. The general provision under which the liability may be classified if it is included at all, is that all debts are provable that are founded upon contracts "express or implied." The term "implied contract" is not defined in the act.¹⁷¹

The discharge of a co-surety in bankruptcy under this act

Minshall, J.: "The mere fact that it was there determined that he was not liable on the bond to the obligee, cannot conclude the plaintiff in this action from demanding contribution from the estate of his deceased co-surety, if, as a matter of fact, they were co-sureties on the bond, and the plaintiff has been compelled to discharge all, or more than his just proportion, of the common liability. The subject matter of the two actions is different. The former was a suit on a treasurer's bond by the obligee against the makers as co-defendants to recover for a breach of it. The present is a suit by one surety on the bond against the estate of another for contribution; and had not accrued at the time of the former suit. It is not based upon the bond. . . . It is not enough that an issue may have been joined between the obligee and the defendant, as to the liability of the latter on the bond. Whatever that issue

may have been, it was not an issue between himself and his co-defendant, the plaintiff in this action, and could not therefore conclude the latter; though parties to the suit they were not such in an adversary character, being simply co-defendants to the suit on the bond."

See also *Hoxie vs. National Bank*, 20 Tex. Civ. App. 462; 49 S. W. 637.

Contra—*Hood vs. Morgan*, 47 W. Va. 817; 36 S. E. 911.

¹⁷⁰*Cawthorne vs. Weisinger*, 6 Ala. 714; *Camp vs. Bostwick*, 20 O. S. 337; *Martin vs. Frantz*, 127 Pa. 389; 18 Atl. 20; *Aldrich vs. Aldrich*, 56 Vt. 324; *Faires vs. Cockerell*, 88 Tex. 428; 31 S. W. 190, 639; *Williams vs. Ewing*, 31 Ark. 229.

See also *Hill vs. Morse*, 61 Me. 541.

Contra—*Cochran vs. Walker*, 82 Ky. 220.

¹⁷¹National Bankruptcy Act of 1898, Sec. 63 (a) (4).

raises a question of some difficulty where the payment by the other surety is subsequent to the discharge.

In such a case it must be definitely determined, in order to dispose of the question, whether the liability to contribute arises upon an implied contract which dates from the making of the suretyship undertaking, or whether the obligation to contribute is an equity which arises for the first time when the other surety pays.¹⁷²

Under the first construction the right of contribution must be barred, under the second it would not be.

The earlier bankruptcy acts of this country and the English acts, contain broader provisions for contingent debts than the act of 1898, and the uncertain liability of a surety to contribute to his co-surety was deemed a provable debt under those acts.¹⁷³

It may be doubted whether a contingent liability to contribute as a co-surety is provable as a debt against a bankrupt surety in cases where no payment is made by the other surety until after the discharge of the bankrupt.

¹⁷² The many and varying expressions of the courts in stating the nature of doctrine of contribution have been referred to in section 279.

¹⁷³ The act of 1841 contained a provision which in general terms described a liability such as is incurred by one co-surety to another, before payment of the debt by either of them. It was provided that all persons "having *uncertain or contingent* demands against such bankrupt shall be permitted to come in and prove such debts or claims, under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them." Act of Aug. 19, 1841, Sec. 5.

The act of 1867 covered the claim of co-sureties for contribution in these terms, Sec. 5068, "In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise pro-

vided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend."

Under these acts it was held that the contingent and uncertain claim of a surety for contribution, depending first upon the contingency that the principal would make default, and second that the other surety would pay, was a provable claim in bankruptcy, and although the surety did not pay until after the discharge of his co-surety, yet the claim for contribution was barred.

Tobias vs. Rogers, 13 N. Y. 59 (Law of 1841). In this case the plaintiff and defendant were sureties upon a replevin bond, and several years after the execution of the bond the defendant was adjudged a bankrupt. Five years after the defendant

§278. Contribution between parties to bills and notes.

Accommodation indorsers are not entitled to contribution in the absence of special agreement to that effect. It may always be assumed that the later indorsers lend their name on the faith of the earlier indorsers as well as in reliance upon the maker. This assumption gives to the later party an advantage

was discharged in bankruptcy the plaintiff was required to pay the penalty of the bond, and thereafter brought this suit for contribution, claiming the liability against the bankrupt to have arisen after his discharge.

Gardiner, C. J.: "The effect of the discharge was to exonerate Rogers from his obligation incurred to the defendants in the replevin suit, by his execution of the bond in their favor, as one of the sureties of Mahoney and Trull. His liability as co-obligor with the plaintiff was extinguished by operation of law; and from that moment he ceased to be a co-surety with him for a common liability or a common principal. . . . The defendants in the replevin suit could have released one of the sureties with the assent of the other, leaving the latter sole guarantor of the performance of the contract of the principal. What the parties could do by agreement the law has done without it. When the sureties contracted for their principal, they knew that the National Legislature could, in the case that has arisen, discharge either of them from the obligation thereby assumed, and that the right of contribution would cease with the liability to which it was antecedent. If the plaintiff is without remedy, it is by an act of the law to which he, in common with every other citizen, is presumed to have assented."

See also *Eberhardt vs. Wood*, 2 Tenn. Ch. 488 (Law of 1867).

In this case the default of the principal occurred before the bankruptcy, but the payment by the surety was after the bankruptcy of the co-surety. It was held, "The discharge was from the obligation as surety, and the inference is logical, that, afterwards, when the plaintiff paid the debt, there was no such relation between him and the defendant as would sustain a claim for contribution, that claim resting solely on the relation of co-suretyship. And so it has been held and on this very ground, *Tobias vs. Rogers*, 13 N. Y. 59. It is argued, however, that although this may be true as to the creditor, yet the plaintiff had no debt or claim against the defendant, as his co-surety, until he paid the decree of the 19th of Jan. 1874, and could not, therefore, prove against the estate of the bankrupt in 1871. But the obligation had become fixed as a debt before the petition in bankruptcy, and the extent of that liability was ascertainable, and the proportion of such liability which such surety might be compelled to pay was contingent upon the ability of the principal. Every surety has a demand against his principal which is contingent upon his being compelled to pay any part of the debt, and such demand is provable. Every joint debtor has a demand against his co-debtor, contingent upon his

of which he cannot be deprived without his consent.¹⁷⁴ It is, however, competent to show by parol that the several indorsers agreed to maintain the relation of co-sureties.¹⁷⁵

Where one signs as surety a note signed by two persons, without knowing that one of the signers is in fact a surety of the maker, he cannot be held as co-surety of such other surety.^{175a}

It is not necessary to show an express contract for contribution. It will be sufficient if the circumstances indicate an intention to become co-sureties. Thus where a maker of a note asked three others to sign for his accommodation; before making the note he made the request of each one separately and each promised to sign if the others did. Nothing was said about the order in which they were to sign or in reference to

being compelled to pay more than his share of the debt, and such demand is provable. It seems to follow logically that every surety has a demand against his co-surety, where the liability is fixed, contingent upon his being compelled to pay more than his share of the debt, and that demand is provable."

Contra—Byers vs. Alcorn, 6 Ill. App. 39; Dunn vs. Sparks, 1 Ind. 397; Swain vs. Barber, 29 Vt. 292.

The reasons upon which these cases rest are that a liability between co-sureties does not exist as a matter of contract, but arises from a principle of equity growing out of the relation of the parties, and that it requires a payment to set on foot this equity, and that such claim does not attach contingently or otherwise till after payment by one co-surety of more than his share, and hence not being provable against the bankrupt, he is not discharged from it.

The English Bankruptcy Act of 1883 provided, Sec. 37 (3) for a discharge from "all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order."

This was construed to include a liability for contribution where the solvent surety was called upon to

pay after the discharge in bankruptcy of his co-surety.

Wolmershausen vs. Gullick, L. R., 2 Ch. Div. (1893) 514. "One defendant I have dismissed from the action on the ground that he is discharged by a composition under Sec. 18 of the Bankruptcy Act, 1883, inasmuch as it appears to me that his liability to contribute, although not ascertained at the time of the bankruptcy proceedings, nor included in the schedule of liabilities or in the claims or proofs, and not a debt in respect of which an adjudication of bankruptcy could have been sustained, was a liability within the meaning of Sec. 37 of the Act, and therefore a debt provable in bankruptcy."

¹⁷⁴ McDonald vs. McGruder, 3 Pet. 470; McGurk vs. Huggett, 56 Mich. 187; 22 N. W. 308; Harrah vs. Doherty, 111 Mich. 175; 69 N. W. 242; Willis vs. Willis, 42 W. Va. 522; 26 S. E. 515; Harshman vs. Armstrong, 43 Ind. 126.

¹⁷⁵ Easterly vs. Barber, 66 N. Y. 433; Preston vs. Gould, 64 Iowa 44; 19 N. W. 834; Kiel vs. Choate, 92 Wis. 517; 67 N. W. 431; Smith vs. Morrill, 54 Me. 48; Harris vs. Jones, 23 N. D. 488; 136 N. W. 1080; Wilson vs. Hendee, 74 N. J. L. 640; 66 Atl. 414.

^{175a} Citizens National Bank vs. Burch, 145 N. C. 316; 59 S. E. 71.

an obligation of contribution. It was held that the order of signing was immaterial, and that these circumstances indicated a mutual understanding that each was a joint obligor with the others.¹⁷⁶

By the provisions of the code in California, all indorsers whether regular or for accommodation are entitled to contribution.¹⁷⁷

§279. The right of indemnity against the principal.

If the promisor in suretyship pays the debt of the principal in whole or in part, he is entitled to recover the amount paid from the debtor. If the principal makes no express promise to indemnify the one who engages to answer for his debt or default, the law will imply a promise.

The right of indemnity springs from the equity that one should not be permitted to shift his burdens upon another merely because the accommodating party, having no special interest in the transaction, has neglected to protect himself by contract.

In the case of the promisor's right of indemnity, the courts have not troubled themselves over the proposition that where there is no express contract the right springs wholly from equity, and that therefore there is the same reason for holding that an action for indemnity is cognizable only in equity, as was so often held in the matter of contribution between co-sureties.¹⁷⁸

From the time of the very earliest cases there has been a general acquiescence in the rule that a payment by a surety or guarantor for the account of their principal is presumed to be at the request of the latter, which raises an implied promise of reimbursement, upon which an action at law will lie.¹⁷⁹

¹⁷⁶ Hagerthy vs. Phillips, 83 Me. 336; 22 Atl. 223.

See also Mulcare vs. Welch, 160 Mass. 58; 35 N. E. 97.

¹⁷⁷ California Civil Code, Sec. 1432; Bunker vs. Osborn, 132 Cal. 480; 64 Pac. 853.

¹⁷⁸ Ante Sec. 260.

Fidelity & Deposit Co. vs. Buckley, 75 N. H. 506; 77 Atl. 402.

In Stirling vs. Forrester, 3 Bligh, 590, Lord Eldon indicated that he had formerly had some doubt whether the surety could enforce the right of indemnity by action at law as upon implied contract.

¹⁷⁹ Toussaint vs. Martinnant, 2 T. R. 100; Wood vs. Leland, 1 Met.

A surety upon a bail bond, conditioned for the appearance of a person charged with crime, has no right of indemnity against the principal for moneys paid upon a forfeited recognizance, except upon an express contract for indemnity. The law will not imply a contract between parties so related. The distinction appears to be that payment by a surety of the penalty of a bail bond does not discharge the obligation of the principal to appear, and no benefit being conferred by the payment, a contract for reimbursement will not be implied, also, that liability upon a bail bond arises from the neglect of the surety in permitting the escape of the principal, and the surety is, in a sense, a wrongdoer, and it would be against public policy for the law to imply a promise of indemnity.¹⁸⁰

387; *Konitzky vs. Meyer*, 49 N. Y. 571; *Clay vs. Severence*, 55 Vt. 300; *Katz vs. Moessinger*, 110 Ill. 372; *Martin vs. Ellerbe's Admr.*, 70 Ala. 326; *Smith vs. Sayward*, 5 Me. 504; *Loughridge vs. Bowland*, 52 Miss. 546; *Cotton vs. Alexander*, 32 Kan. 339; 4 Pac. 259; *Hazleton vs. Valentine*, 113 Mass. 472; *Blake vs. Downey*, 51 Mo. 437; *Hellams vs. Abercrombie*, 15 S. C. 110; *Boyd vs. Brooks*, 34 Beav. 7; *Badeley vs. Consolidated Bank*, 34 Ch. Div. 536; *Cooper vs. Parker*, 176 Ala. 122; 57 So. 472.

If the principal makes an express contract of indemnity at the time the surety enters into the undertaking, the promise implied by law will be merged in the express agreement, and recovery will be limited to the terms of the latter. *Roosevelt vs. Mark*, 6 Johns. Ch. 266.

But a special indemnity contract given by a stranger will not merge the contract implied by law. *Wesley Church vs. Moore*, 10 Pa. 273.

¹⁸⁰ *Jones vs. Orchard*, 16 C. B. 614.

Chippes vs. Hartnoll, 4 B. & S. 414. *Pollock, C. B.*: "Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indem-

nify the person who became bail for him. There is no debt, and with respect to the person who bails, there is hardly a duty."

Contra—*Reynolds vs. Harral*, 2 Strob. (S. C.) 87.

But though there is no such implied promise to sustain an action by the principal in the recognizance, and no subrogation in equity, the accused can make an express contract by bond, deed of trust, or oral promise to indemnify. *United States vs. Ryder*, 110 U. S. 729; *Moloney vs. Nelson*, 158 N. Y. 351; 53 N. E. 31; *Carr vs. Davis*, 64 W. Va. 522; 63 S. E. 326; 20 L. R. A. (N.S.) 58; *Stevens vs. Hay*, 61 Ill. 399; *Leary vs. U. S.*, 224 U. S. 567.

Contra—*Consol. Co. vs. Musgrave*, 1 L. R. A. Ch. Div. 37 (1900).

It is held that it is against public policy to accept a bail bond in a criminal proceeding where there is a special contract of indemnity. *United States vs. Simmons*, 47 Fed. Rep. 575.

See also *Herman vs. Jeuchner*, 15 Q. B. Div. 561, where it is held that a contract to indemnify against loss in becoming surety upon a bail bond is illegal.

Brett, J.: "It is illegal, because it takes away the protection which the law affords for securing the good behavior of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to

Where the consideration for the suretyship contract is illegal, as where a public officer, in consideration that the surety will sign his bond, agrees to deposit public funds in the bank of the surety, no promise of indemnity will be implied, and indemnity can not be enforced.¹⁸¹

The law will not imply a promise against all who may have been benefited by the payment of the surety, but only against the one whose debt has been discharged.

Where one member of a firm gave bond to the United States for the payment of duties on imported goods, and the surety was compelled to pay, it was held that he could not recover against the other partners upon an implied promise of indemnity, even though the importations were by the partnership, and the bond was given for the benefit of the firm.¹⁸²

see that his principal obeys the order of the court; at least, this is the rule in the criminal law; but if money to the amount for which the surety is bound is deposited with him as indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed."

¹⁸¹ Ramsay's Est. vs. Whitbeck, 183 Ill. 550; 56 N. E. 322, *Cartwright, C. J.*. "When a surety signs a bond the law raises an implied promise by the principal to reimburse the surety for any loss which he may sustain, and when a loss occurs this implied contract of indemnity relates back and takes effect from the time when the surety became responsible. Under this rule, when the sureties signed the bond of Ramsay the law implied a promise on his part to indemnify and save them harmless from all loss which they might sustain by reason of such signing, and when they made up the deficit this implied promise related back to the date of

the bond. This implied promise was perfectly lawful and legal, and it is said that if there was a separate promise on the part of Ramsay to keep the money in the banks it would not prevent a recovery by the sureties upon the lawful promise to reimburse them. This argument loses sight entirely of the consideration upon which Ramsay's promise rested. . . . The law will not enforce the lawful implied promise of indemnity resting upon the illegal consideration that the banks would borrow money and pay interest on it."

Foreign corporation not licensed to do business in state of suit can not maintain action against surety company on liability bond against defalcation of employee. *McCanna vs. Citizens' Trust & Surety Co. of Philadelphia*, 76 Fed. 420.

¹⁸² *Tom vs. Goodrich*, 2 Johns. 213, *Kent, C. J.*: "There is no privity between the parties but what arises from the bond. It would be refining upon the doctrine of implied assumpsits, and going beyond every case, to consider the surety in a bond, as having, by that act, a remedy at law against other persons, for whom the principal in the bond may have acted as trustee."

See also *Moore vs. Stevens*, 60 Miss. 809; *Krafts vs. Creighton*, 3 Rich. L. (S. C.) 273.

It is held that where one member of a partnership executes his individual obligation for the benefit of the firm, and represents to the surety that it is a firm debt, and requests him to sign on behalf of the firm, that the promisor thereby becomes a surety for the partnership, and a payment by the surety raises an implied promise against all the members of the firm.¹⁸³

A surety for one of two or more joint obligors cannot recover indemnity from any except the particular debtor for whom he engaged, as where in a suit against several partners a bond is given by one partner, and the surety pays the judgment against all the partners, the implied promise of indemnity arises only as against one.¹⁸⁴

Promise of indemnity will not be implied where the surety or guarantor is a mere volunteer, and signs without request of the principal.¹⁸⁵

If a verbal promise of suretyship is made at the request of the principal and the promisor pays, he may recover indemnity, although payment could not have been enforced against him by the creditor, by reason of the Statute of Frauds.¹⁸⁶

¹⁸³ *Purviance vs. Sutherland*, 2 O. S. 478; *McKee vs. Hamilton*, 33 O. S. 7; *Burns vs. Parish*, 3 B. Mon. (Ky.) 8; *Springs vs. McCoy*, 122 N. C. 628; 29 S. E. 903; *Garner vs. Hudgins*, 46 Mo. 399.

¹⁸⁴ *Bowman vs. Blodgett*, 2 Met. 308; *Yoder vs. Briggs*, 3 Bibb. (Ky.) 228; *Oshorn vs. Cunningham*, 4 Dev. & Bat. Law (N. C.) 423.

¹⁸⁵ *Carter vs. Black*, 4 Dev. & Bat. Law (N. C.) 425; *Executors of White*, 30 Vt. 336; *McPherson vs. Meek*, 30 Mo. 345.

But see *Teberg vs. Swenson*, 32 Kan. 224; 4 Pac. 83.

Contra—*Hecker vs. Mahler*, 64 O. S. 398.

¹⁸⁶ *Beal vs. Brown*, 13 Allen, 114. In this case the guarantor was debtor of the principal, and when sued he pleaded set-off on account of money paid upon a verbal guaranty for the plaintiff, held—*Bigelow, C.*

J.: “The Statute of Frauds can not avail the plaintiff, as an answer to the set-off. Although the verbal guaranty was within it, and might have been avoided if the defendant had seen fit to rely upon the statute when called on by the plaintiff’s creditor for the payment of the debt, the defendant was not bound to set it up. He had a right to perform his parol undertaking. It was a contract made on a good consideration, which the statute does not declare void or illegal, but only provides that no action shall be maintained upon it against the guarantor. But this enactment is exclusively for the benefit of the guarantor, and is designed to protect him from the danger of being made liable for the debts of another by false testimony. He may elect to fulfill his verbal

§280. When right of indemnity arises.

An implied contract to indemnify one who pays the debt of another arises at the time the suretyship is made. "Upon well settled principles, it is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may pay to the creditor in consequence of the liability assumed takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety."¹⁸⁷

The relation of debtor and creditor between the principal and his accommodation promisor dates from the inception of the suretyship contract without regard to the time when the promisor pays,¹⁸⁸ and a surety or guarantor in the prosecution of his right of indemnity may have a fraudulent conveyance set aside, made by the principal prior to the payment.¹⁸⁹ But a cause of action against the principal does not arise until the promisor makes payment.¹⁹⁰

It is not necessary to pay the entire debt; an indemnity may

promise, and, if he does so and pays money in pursuance thereof, the principal debtor is liable for the amount as for money paid at his instance and request. The Statute of Frauds can have no operation as between the original debtor and his guarantor."

¹⁸⁷ *Bigelow, C. J.*: In *Rice vs. Southgate*, 16 Gray 142; *Poe vs. Dixon*, 60 O. S. 124; 54 N. E. 86.

See also *Martin vs. Ellerhe's Adm.*, 70 Ala. 326; *Harper vs. McVeigh*, 82 Va. 751; 1 S. E. 193; *Polhill vs. Brown*, 84 Ga. 338; 10 S. E. 921; *Zollickoffer vs. Seth*, 44 Md. 359;

Child vs. Powder Works, 44 N. H. 354; *Hook vs. Richeson*, 115 Ill. 431; 5 N. E. 98; *Davis vs. Hoopes*, 33 Miss. 173; *Griffin vs. Long*, 131 S. W. 672.

¹⁸⁸ *In re Stout*, 109 Fed. Rep. 794.

¹⁸⁹ *Loughridge vs. Bowland*, 52 Miss. 546; *Hatfield vs. Merod*, 82 Ill. 113; *Bragg vs. Patterson*, 85 Ala. 233; 4 South. 716; *Anderson vs. Walton*, 35 Ga. 202; *Smith vs. Young*, 173 Ala. 190; 55 So. 425.

But see *Williams vs. Tipton*, 5 *Humph. (Tenn.)* 66; *Rice vs. Downing*, 12 B. Mon. (Ky.) 44.

¹⁹⁰ *Stearns vs. Irwin*, 62 Ind. 558; *Barth vs. Graf*, 101 Wis. 27;

be enforced upon part payment to the extent of the amount paid, and if the debt is paid by installments, action may be brought for each installment as it is paid.¹⁹¹

A cause of action for indemnity, in the absence of an enabling statute or express agreement, cannot arise before the maturity of the debt, although if payment is made by the surety or guarantor before maturity, it will constitute a ground for indemnity when the debt becomes due, and action can then be brought as if the payment had been made at that time.¹⁹²

The common law rule as to the time when action for indemnity may be brought has in part been superseded by statute in many of the states which provide for action before debt due whenever grounds exist for the provisional remedy of attachment.¹⁹³

§281. Equitable exoneration.

A Court of Equity has jurisdiction to compel the principal to exonerate the surety or guarantor at the maturity of the

76 N. W. 1100; *Minick vs. Huff*, 41 Neb. 516; 59 N. W. 795; *Nally vs. Long*, 56 Md. 567.

It is held that where a surety holds as indemnity against his suretyship liability the note of a third person, that he may maintain action upon such note as soon as the principal is in default, and need not first pay the debt. *Klein vs. Funk*, 82 Minn. 3; 84 N. W. 460.

The Statute of Limitations runs against the right of indemnity from the time the surety or guarantor pays and the right of action is not affected by the date of the maturity of the debt. *Thayer vs. Daniels*, 110 Mass. 345; *Harper vs. McVeigh*, 82 Va. 751; 1 S. E. 193.

¹⁹¹ *Bullock vs. Campbell*, 9 Gill (Md.) 182; *Hall vs. Hall*, 10 Humph. (Tenn.) 352; *Wilson vs. Crawford*, 47 Iowa 469; *Vermeule*

vs. York Cliffs Improv. Co., 105 Me. 350; 74 Atl. 800.

But see *Jones vs. Trimble*, 3 Rawle (Pa.) 381.

¹⁹² *Tillotson vs. Rose*, 11 Met. 299; *Armstrong vs. Gilchrist*, 2 Johns. Cas. (N. Y.) 424; *White vs. Miller*, 47 Ind. 385; *Ross vs. Meneff*, 125 Ind. 432; 25 N. E. 545; *Golsen vs. Brand*, 75 Ill. 148; *Felton vs. Bissell*, 25 Minn. 15; *Barber vs. Gillson*, 18 Nev. 89; 1 Pac. 452.

¹⁹³ *Putmoor vs. Young*, 57 Ark. 528; 22 S. W. 169. The Code in Ohio provides, Sec. 5846: "A surety may maintain an action against his principal to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist upon which an order may be made for arrest or for an attachment."

debt, and it is not necessary that the promisor first pay any part of the debt himself, but the principal debtor who is ultimately bound for the debt may be required to discharge his obligation.¹⁹⁴

This is an application of the same principle of equity whereby a surety at the suit of his co-surety may be required by a decree in equity to pay his contributory share to the creditor.¹⁹⁵

Where the principal has made a special covenant with his surety that he will discharge the debt, the surety may maintain action on the covenant for his exoneration without first paying the debt.¹⁹⁶

If the principal is insolvent and the surety holds securities belonging to the principal, equity will decree the application of the securities in exoneration of the surety.¹⁹⁷

§282. Right of indemnity arises from payment or transactions equivalent to payment.

It is not necessary that the promisor in suretyship pay the debt in money in order to create a cause of action upon his implied contract of indemnity. Whatever is accepted by the creditor as a satisfaction of the principal obligation may be considered a substitute for actual payment, and entitles the promisor to his action for indemnity.

If the creditor accepts the negotiable note of the surety or

¹⁹⁴ *Street vs. Chicago Co.*, 157 Ill. 605; 41 N. E. 1108; *Keach vs. Hamilton*, 84 Ill. App. 413; *Neall vs. Buffington*, 42 W. Va. 327; 26 S. E. 172; *Hoppes vs. Hoppes*, 123 Ind. 397; 24 N. E. 139; *Meador vs. Meador*, 88 Ky. 217; 10 S. W. 651; *Norton vs. Reid*, 11 S. C. 593; *Beaver vs. Beaver*, 23 Pa. 167; *Bishop vs. Day*, 13 Vt. 81; *Harris vs. Newell*, 42 Wis. 687; *Dobie vs. Fidelity & Casualty Co.*, 95 Wis. 540; 70 N. W. 482; *Hayden vs. Thrasher*, 18 Fla. 795; *Macfie vs. Kilanea*, 6 Hawaiian 440; *Mathews vs. Saurin*, L. R., 31 Ir. 181; *Wooldridge vs. Norris*, L. R., 6 Eq. 410; *Pavarini & Wyne vs. Title Guaranty & Surety Co.*, 36 App. D. C., 348.

It is not essential to this action that the principal debtor be insolvent or in danger of becoming so. *Holcolombe vs. Fetter*, 70 N. J. E. 300; 67 Atl. 1078.

¹⁹⁵ *Ante* Sec. 270.

¹⁹⁶ *Loosemore vs. Radford*, 9 M. & W. 657; *Lathrop vs. Atwood*, 21 Conn. 116; *Salmon Falls Bank vs. Leyser*, 116 Mo. 51; 22 S. W. 504; *Lee vs. Burrell*, 51 Mich. 132; 16 N. W. 309; *Gage vs. Lewis*, 68 Ill. 604.

¹⁹⁷ *McKnight vs. Bradley*, 10 Rich. Eq. (S. C.) 557.

See also *Mattingly vs. Sutton*, 19 W. Va. 19; *Sims vs. Wallace*, 6 B. Mon. (Ky.) 410; *Scott vs. Timberlake*, 83 N. C. 382; *Craighead vs. Swartz*, 219 Pa. St. 149; 67 Atl. 1003.

guarantor,¹⁹⁸ or the note or other property of a third person,¹⁹⁹ the surety may proceed at once against the principal, although the note is not paid.

It is held that the delivery of a non-negotiable note or bond of the surety, although accepted in settlement of the debt, will not, before actual payment of the note or bond, constitute a cause of action for indemnity.²⁰⁰

Although the law appears by the foregoing citations to be well established as stated, yet the payment with the negotiable note of the surety, or with any other medium except money or property, notwithstanding it results in the discharge of the principal by the creditor, does not bring the surety within the equities upon which the doctrine of indemnity is founded.

The legal position of the surety is in no respect changed by the giving of the note or bond to the creditor. His liability in consequence thereof is no greater than his original liability as surety.

If he evades payment on his note, either from insolvency or some defect in the note which renders it void, or because payment is not demanded within the statutory limitation, a recovery by the surety from the principal would be a fraud, as he would receive and retain money which rightfully belonged to the creditor, but which a rule of "equity" prevents the creditor from recovering from him.

The anomaly of this position is further illustrated by the generally accepted view that the surety cannot speculate upon his relations to the principal, by making a compromise settlement with the creditor for less than the face of the debt, and

¹⁹⁸ *Barclay vs. Gooch*, 2 Esp. 571; *Howe vs. Buffalo, N. Y. & Erie R. R. Co.*, 37 N. Y. 297; *Stubbins vs. Mitchell*, 82 Ky. 535; *Knightoh vs. Curry*, 62 Ala. 404; *Rizer vs. Callen*, 27 Kan. 339; *Bausman vs. Credit Guarantee Co.*, 47 Minn. 377; 50 N. W. 496; *Stanley vs. McElrath*, 86 Cal. 449; 25 Pac. 16; *Kellar vs.*

Boatman, 49 Ind. 104; *Sapp vs. Aiken*, 68 Iowa 699; 28 N. W. 24; *Wilson vs. Hite's Exr.*, 157 S. W. 41.

¹⁹⁹ *Rodgers vs. Maw*, 15 M. & W. 444; *Lord vs. Staples*, 23 N. H. 448; *Hulett vs. Soullard*, 26 Vt. 295; *McVicar vs. Royce*, 17 Up. Can. (Q. B.) 529.

²⁰⁰ *Romine vs. Romine*, 59 Ind. 346; *Taylor vs. Higgins*, 3 East. 169.

thereafter collect the full amount from the principal,²⁰¹ or recover more than the actual value of the property which he turns out to the creditor in settlement.²⁰²

The result of the authorities therefore seems to be that if the creditor accepts in settlement the worthless note of the surety, the latter may nevertheless recover from the principal the full amount of the debt extinguished. But if the creditor accepts in settlement the land or other property of the principal for the entire debt, when such property is worth only half the amount, the surety may have indemnity for only half the debt extinguished.

The reasoning seems defective, which on the one hand gives recovery for the whole debt to the surety who parts with nothing, and on the other hand scales down his bargain and measures with great precision the value of that which he gives in settlement.

§283. Amount recoverable by indemnity proceedings.

A promisor in suretyship is entitled to full indemnity from the principal for all loss occasioned by the default of the latter, and may call upon him for reimbursement, not only for what he is required to pay in satisfaction of the debt, but also for all reasonable expenses incurred in the matter of the adjustment of his liability.

²⁰¹ *Reed vs. Norris*, 2 Mylne & Craig, 361, *Lord Cottenham, C.*: "It is on a contract for indemnity that a surety becomes liable for the debt. It is by virtue of that situation, and, because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting."

See also *Stanford vs. Connery*, 84 Ga. 731; 11 S. E. 507; *Waldrip vs. Black*, 74 Cal. 409; 16 Pac. 226;

Child vs. Eureka Powder Works, 44 N. H. 354; *Coggeshall vs. Ruggles*, 62 Ill. 401; *Delaware L. & W. R. R. Co. vs. Oxford Iron Co.*, 38 N. J. Eq. 151; *Price vs. Horton*, 4 Tex. Civ. App. 526; 23 S. W. 501; *Martin vs. Ellerbe's Admr.*, 70 Ala. 326; *Martindale vs. Brock*, 41 Md. 571; *Thomas vs. Carter*, 63 Vt. 609; 22 Atl. 720; *Cranmer vs. McSwords*, 26 W. Va. 412.

²⁰² *Bonney vs. Seely*, 2 Wend. 481; *Feamster vs. Withrow*, 12 W. Va. 611; *Kendrick vs. Forney*, 22 Gratt. 748; *Jordan vs. Adams*, 7 Ark. 348.

Where an accommodation indorser paid the notes of the principal and took an assignment of them and thereafter brought action on the notes, it was held that the indorser was entitled to recover from the principal the expenses incurred in the matter of the collection.²⁰³

If the surety is sued he may recover the costs of litigation from the principal.²⁰⁴ Where a joint action is brought against the principal and surety there is additional justification for the rule that the surety may recover costs of the principal. While the surety has the right to pay upon demand without suit, and recover indemnity from the principal, he is not obliged to settle in that way, and if the principal is also sued, payment by the surety may properly be withheld in the hope that the creditor may be able to collect his claim by execution against the property of the principal.²⁰⁵ But litigation must be entered into in good faith, and upon reasonable ground, in order to charge the principal with costs. Where the litigation is prolonged merely to gain an extension of time for payment, the expenses cannot be recovered.²⁰⁶

A surety cannot in any event recover from the principal more than he has paid for his account. It is the amount of payment and not the amount of the debt extinguished which fixes the measure of recovery. "If the surety discharges the debt of his principal in whole or in part for any sum less than the full

²⁰³ Thompson vs. Taylor, 72 N. Y. 32.

The owner of a department store was compelled to pay a judgment recovered against it by a person injured while riding in an elevator, designed by the defendant pursuant to a contract with the owner. Part of such judgment was repaid to the owner by an indemnity assurance company which had issued a policy indemnifying it in a specified amount for damages on account of bodily injuries sustained by any person while riding in the elevator. The policy provided that the assurance company should be subrogated to all claims and rights of the owner in respect to such loss against any person or persons; hence a contractual relation existed between the defendant and the owner, and such owner and the assurance company could maintain an action against the defendant which made and installed the elevator, and recover the amount paid by each of them for damages on account of

the judgment against the owner. The assurance company having paid the taxable costs taxed against the owner was permitted to recover them in this action, but, having under the terms of its policy defended the action against the owner, expenses incurred by it in the defense of the action could not be recovered. *Wanamaker vs. Otis Elevator Co.*, 228 N. Y. 192; 126 N. E. 718. See 8 Virginia Law Review 455, "Right of Employer and Insurer to Subrogation Under the Workmen's Compensation Acts Against a Third Person Causing Injury to an Employee."

²⁰⁴ *Hulett vs. Soullard*, 26 Vt. 295; *Downer vs. Baxter*, 30 Vt. 467; *Backus vs. Coyne*, 45 Mich. 584; 8 N. W. 694; *Gross vs. Davis*, 87 Tenn. 226; 11 S. W. 92.

²⁰⁵ *Apgar's Admr. vs. Hiller*, 24 N. J. L. 812.

²⁰⁶ *Whitworth vs. Tilman*, 40 Miss. 76; *Wynn vs. Brooke*, 5 Rawle (Pa.) 106; *Cranmer vs. McD Swords*, 26 W. Va. 417.

amount he so discharges, he can, in the absence of an express contract, recover from his principal only the amount actually paid by him. The implied contract in such case is that the surety shall be indemnified only, and he will not be allowed to speculate out of his principal.²⁰⁷

If judgment is obtained against a surety and collected by execution upon his property, the principal cannot be charged with the costs upon the execution. It is the duty of the surety to pay the judgment, and the execution results from his own neglect.²⁰⁸

No recovery can be had for damages resulting indirectly from the suretyship, such as inconvenience or loss in consequence of being obliged to sell property in order to raise money with which to pay the debt. Such disadvantages and possible losses are deemed waived by one assuming the liability.²⁰⁹

§284. Right of indemnity as affected by the non-liability of the principal.

A principal generally owes no duty of indemnity in those cases in which payment is made by the surety or guarantor upon claims for which the principal is not liable.

But such rule will not be applied where the non-liability arises from causes which do not also afford a defense to the suretyship promisor.²¹⁰

If the principal is not liable, and in consequence of the same defects in the main contract the surety or guarantor might also maintain a defense, or where the statute of limitations applies to both, a payment by the latter under such circumstances will be deemed voluntary,²¹¹ but if the defense is not available to the

²⁰⁷ Mathews vs. Hall, 21 W. Va. 510; *ante*, Sec. 299, and cases there cited.

Contra—Walker vs. C. M. & N. R. R. Co., 277 Ill. 451; 115 N. E. 659.

²⁰⁸ Pierce vs. Williams, 23 L. J. Ex. 322; Newcomb vs. Gibson, 127 Mass. 396; Van Petten vs. Richardson, 68 Mo. 379; Beckley vs. Munson, 22 Conn. 299.

But see Kemp vs. Finden, 12 M. & W. 421; Van Winkle vs. Johnson, 11 Ore. 469; 5 Pac. 922.

²⁰⁹ Vance vs. Lancaster, 3 Haywood (Tenn.) 130.

See also Hayden vs. Cabot, 17 Mass. 169.

Powell vs. Smith, 8 Johns. 250. In this case the surety was imprisoned for the debt of his principal and

sought recovery in damages and it was held—"The plaintiff did not, upon the trial, show any contract or promise of indemnity against trouble or harm. He showed nothing more than that he had become surety on a note for the defendant, and that having omitted to take it up when it fell due, he had been sued and imprisoned. This fact alone did not entitle him to recovery."

²¹⁰ Gieseke vs. Johnson, 115 Ind. 308; 17 N. E. 573. See also Second Nat. Bank vs. American Bonding Company, 93 O. S. 362; 113 N. E. 221.

²¹¹ Hatchett vs. Pegram, 21 La. Ann. 722; Hollinsbee vs. Ritchey, 49 Ind. 261.

Roe vs. Kiser, 62 Ark. 92; 34 S.

promisor, his right of indemnity is not impaired by the non-liability of the principal.

Thus where the principal is deceased, and the creditor fails to make claim against his estate until after expiration of the statutory time within which such claims are required to be presented, and the debt against the estate is accordingly barred, under these circumstances, if the surety remains liable and pays the debt, he may recover indemnity from the estate.²¹²

Also where no claim is asserted by the holder of a note against the maker, but judgment is obtained against the surety, who pays the judgment after the right of action by the holder against the maker, is barred by the statute of limitations, the surety may recover from the principal.²¹³

It was held that where the claim against the surety was kept alive by special agreement for extension, but barred against the principal, the surety paying may recover indemnity.²¹⁴

W. 534. In this case the note of the principal was void on account of usury, and the surety paid with knowledge of the defense. It was held that he was not entitled to indemnity.

²¹² Sibley vs. McAllister, 8 N. H. 389; Hooks vs. Branch Bank, 8 Ala. 580; Marshall vs. Hudson, Adm., 9 Yerg. (Tenn.) 57; Miller vs. Woodward, Adm., 8 Mo. 169; Braught vs. Griffith, 16 Iowa 26.

²¹³ Godfrey vs. Rice, 59 Me. 308;

Reid vs. Flippen, 47 Ga. 273, *McCay, J.*: "The holder had the right to sue all or either of the parties to it, at his pleasure. He saw fit, before the statutory bar attached, to sue the securities only. This he had a right to do, by the very terms of the contract; nor has it ever been held that it is any wrong to the principal to fail to bring suit against him at the same time as suit is brought against the surety. . . . Does the fact that, since the

bringing of the suit, the statute of limitations has barred a suit by the plaintiff against the principal destroy the right against the securities? The foundation of all the rules discharging the surety for acts or neglect of the creditor is, that these acts have injured the surety. And if the neglect of the creditor to sue the principal until the statutory bar attaches so operated as to injure the surety, I should hesitate to hold the surety bound. But in our opinion, the attaching of the statutory bar between the principal and the creditor does not injure the security. If he be still bound and has the debt to pay, the right to recover the money paid out of the principal still exists, notwithstanding the note, the obligation to the creditor, be barred."

See also Walker, Adm., vs. Lathrop, 6 Iowa 516; Bullock vs. Campbell, 9 Gill (Md.) 182.

²¹⁴ Norton vs. Hall, 41 Vt. 471.

If the principal might have successfully defended against the debt on account of a failure of consideration, and the surety pays without request from the principal, without judgment being entered against him, he cannot recover indemnity from the principal.²¹⁵

Where the creditor releases the principal and recovers from the surety, the latter may recover from the principal.²¹⁶

It is held that where the debt rests upon some illegal consideration, such as a note executed in settlement of a wager, that the surety paying cannot charge the principal by way of indemnity since the principal himself is not liable on the note.²¹⁷

Where the non-liability of the principal results from a want of capacity to make the contract the surety paying cannot enforce indemnity. "There is no doubt of the rule, that the principal is responsible to the surety for any liability incurred by the surety at the request of the principal. But that rule is subject to exceptions. A surety for an idiot, infant, *feme covert*, etc., may be liable when the principals are not liable either to the obligee or to him. So a surety for a corporation in a transaction where the corporation has not the power to contract, may be liable when the corporation is not. And a corporation may exceed its powers when there is no moral turpitude; as a Board of County Commissioners contracting a debt to build a church, a very praiseworthy object; but still, it is beyond their power; and they would not be bound while their surety would be."²¹⁸

§285. Right of indemnity as affected by the non-liability of the surety or guarantor.

If a promisor in suretyship pays the debt when he might have avoided payment by asserting defenses sufficient for his

²¹⁵ *Sponhaur vs. Malloy*, 21 Ind. App. 287; 52 N. E. 245. If the surety pays without notice of the failure of consideration he may recover from the principal.

Gasquet vs. Oakey, 19 La. 76.

²¹⁶ *Hyde vs. Miller*. 45 App. Div.

(N. Y.) 396; 60 N. Y. S. 974; affirmed 168 N. Y. 590; 60 N. E. 1113.

²¹⁷ *Harley vs. Stapleton's Adm.*, 24 Mo. 248.

²¹⁸ *Davis vs. Board of Commissioners of Stokes Co.*, 72 N. C. 441.

exoneration, he may nevertheless recover his indemnity of the principal, if the creditor might in any manner have enforced the claim against the principal.

One collaterally bound for the accommodation of another may frequently evade his liability for reasons which in no way affect the liability of the principal, and the waiver of such defenses does not change his attitude toward the principal debtor.

This may be illustrated by the case of an accommodation indorser who is entitled to demand and notice as a condition of his liability. If such conditions are not complied with, and he pays the note, he can nevertheless recover from the principal upon his implied contract of indemnity.²¹⁹ The same is also true where the statute of limitations has run against the surety but not the principal maker of a note.²²⁰

Where a surety held a mortgage upon the land of the principal as indemnity against his suretyship, and paid the debt when he might have defeated the claim by pleading the statute of

²¹⁹ *Stanley vs. McElrath*, 86 Cal. 449; 25 Pac. 16.

Contra—*Sleigh vs. Sleigh*, 5 Ex. 514, *Parke, B.*: "Now there is no doubt, that, if a person lends his name to another for his accommodation, the party accommodated undertakes to pay the bill at maturity, and further, to indemnify the person accommodating him, in case that person is compelled to pay the bill for him; and this, no doubt, is an implied authority to such person to pay it, if he be in that situation that he may be compelled by law to pay the bill, though the holder do not actually compel him to do so; and after payment he may sue the party accommodated for money paid on his account; for such payment is, in truth, under the implied authority given by the contract of accommodation between the parties; and whether this be a payment of the whole bill, or of only a part of it,

makes no difference. But the defendant, as the person accommodated, has not, we think, undertaken to indemnify the plaintiff against the consequences of any payment which the plaintiff may voluntarily make with knowledge of the circumstances. Whether it is so in cases in which the legal obligation has been discharged by circumstances unknown to him, as for instance, by the creditor having given time to the principal debtor without his knowledge, it is unnecessary to determine; but where a payment is made, as in this case, with the knowledge on the part of the plaintiff that he was not bound to pay, for the want of a notice of dishonor, to which he was unquestionably entitled, we think the payment is not made with the implied authority of the defendant."

²²⁰ *McClatchie vs. Durham*, 44 Mich. 435; 7 N. W. 76.

limitations, it was held that the surety could not enforce his mortgage security as against third parties asserting liens upon the property, as such lienors might maintain any defense to the debt that the surety could have interposed.²²¹

§286. When judgment against the surety or guarantor is conclusive as to the right to recover indemnity.

If the surety is sued with the principal, or if when sued alone notice is given the principal, and the surety pays the judgment, such judgment is conclusive against the principal as a basis of recovery in an action for indemnity.²²²

It has been held that where the principal had no notice of the action against the surety, that a judgment by default against the surety entitles him to recover indemnity even though the principal had a complete defense, and by separate suit against him the creditor failed to recover.²²³

A judgment by default against the surety will generally be binding on the principal, except where the surety omits to make defense under circumstances that would charge him with negligence or bad faith.²²⁴

§287. Indemnity as affected by the bankruptcy of the principal.

Under the National Bankruptcy Act of 1898 the discharge of the principal in bankruptcy does not discharge the surety,²²⁵ and the liability to indemnify a surety or guarantor, is, by the terms of the act made a provable claim against the estate of the bankrupt. "Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any

²²¹ May vs. Ball, 21 Ky. L. Rep. 1673; 56 S. W. 7.

²²² Hare vs. Grant, 77 N. C. 203; Littleton vs. Richardson, 34 N. H. 179; Rice vs. Rice, 14 B. Mon. (Ky.) 335; Konitzky vs. Meyer, 49 N. Y. 571. *Prima facie* only. Grommes vs. St. Paul Trust Co., 147 Ill. 634; 35 N. E. 820.

²²³ Stinson vs. Brennan, 1 Cheves Law (S. C.) 15.

²²⁴ Doran vs. Davis, 43 Iowa 86.

²²⁵ National Bankruptcy Act, Sec. 16 (a): "The liability of a person who is co-debtor with, or guarantor of or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." Witt-haus vs. Zimmerman, 9 App. Div. (N. Y.) 202; 86 N. Y. S. 315; 14 N. Y. Ann. Cases 379; Goyer Co. vs. Jones, 79 Miss. 253; 30 So. 651.

person, fails to prove such claim, such person may do so in the creditor's name."²²⁶

The liability for indemnity being a provable debt against the bankrupt, the discharge therefore, bars the right of recovery except out of the assets of the estate, even though payment by the surety is not made till after the discharge.²²⁷

²²⁶ Sec. 57 (i).

The liability of a bankrupt as surety, guarantor, indorser, and the like, for another is provable, and is therefore barred by a discharge in bankruptcy if it existed when proceedings in bankruptcy were begun. *Hardy Buggy Co. vs. Paducah Banking Co.*, 183 Ky. 776; 210 S. W. 452.

Under the bankrupt act of 1898 a means is provided whereby a party secondarily liable may prove the claim against the primary debtor, if the creditor does not prove it. The claim of a surety against his principal, for a debt which the surety is obliged to pay after the discharge of his principal in bankruptcy, is therefore barred by such discharge. *Hayer vs. Comstock*, 115 Iowa 187; 88 N. W. 351.

²²⁷ *Mace vs. Wells*, 7 How. 272. This case arose under the bankruptcy act of 1841 in which provision was made for proving the contingent claims of sureties. The language of the act was "Sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act." It was held that although the cause of

action arose after the discharge in bankruptcy, it was nevertheless such a contingent demand as might have been proved against the estate, and was therefore barred.

The surety may, too, prove in bankruptcy his right of subrogation. The creditor of a bankrupt, who has received a merely voidable preference, and who has in good faith retained such preference until deprived thereof by the judgment of a court upon a suit of the trustee, can thereafter prove the debt so voidably preferred. *Keppel vs. Tiffin Savings Bank*, 197 U. S. 356.

See also *Liebke vs. Thomas*, 116 U. S. 605; 6 S. Ct. 496; *Lipscomb vs. Grace*, 26 Ark. 231; *Noland vs. Wayne*, 31 La. Ann. 401; *Hunt vs. Taylor*, 108 Mass. 508; *Crafts vs. Mott*, 4 N. Y. 603.

But see *Thayer vs. Daniels*, 110 Mass. 345. This case arose under the insolvency laws of the State of Massachusetts, which made no provision for proving a contingent liability against the estate of the insolvent, and it was held that where payment was made by the surety after the discharge, the surety could recover indemnity from the principal.

Ante, Sec. 100, note 122.

TABLE OF CASES.

(References are to sections.)

A

- Abbott vs. Brown, 131 Ill. 108, Sec. 117.
vs. Williams, 15 Colo. 512, Sec. 205.
- Abell vs. Alexander, 45 Ind. 523, Sec. 83.
- Aberdeen vs. Honey, 8 Wash. 251, Sec. 135, 136.
- Acer vs. Hotchkiss, 97 N. Y. 395, Sec. 244, 254.
- Acers vs. Curtis, 68 Tex. 423, Sec. 272.
- Ackerly vs. Parkinson, 3 Maule & Selwyn 411, Sec. 168.
- Acme Mfg. Co. vs. Reed, 197 Pa. St. 359, Sec. 66.
- Adam vs. Gomila, 37 La. Ann. 479, Sec. 208.
- Adams vs. Drake, 11 Cush. 504, Sec. 249.
vs. Flanagan, 36 Vt. 400, Sec. 264.
vs. Gilchrist, 63 Mo. App. 639, Sec. 188.
vs. Hayes, 120 N. C. 383, Sec. 273.
vs. Huggins, 73 Mo. App. 140, Sec. 9.
vs. Jacoway, 34 Ark. 542, Sec. 206.
vs. Jones, 12 Pet. 207, Sec. 65.
vs. Olive, 57 Ala. 249, Sec. 195.
vs. People, 12 Ill. App. 380, Sec. 230.
vs. Thompson, 18 Neb. 541, Sec. 191.
- Addison vs. State, 14 Tex. Crim. App. 568, Sec. 231.
- Adelberg vs. U. S. Fidelity & Guar. Co., 90 N. Y. Supp. 465, Sec. 239.
- Adler vs. State, 35 Ark. 517, Sec. 104, 232, 11a.
- Administrator vs. McKowen, 48 La. Ann. 251, Sec. 153.
- Advance Thresher Co. vs. Hogan, 74 O. S. 307, Sec. 118.
- Ady vs. Freeman, 90 Iowa 402, Sec. 197.
- Aetna Co. vs. Fowler, 108 Mich. 557, Sec. 107.
vs. Thompson, 68 N. H. 20, Sec. 244.
- Aetna Indemnity Co. vs. State, 101 Miss. 703, Sec. 224.
vs. Waters, 110 Md. 673, Sec. 17.
- Aetna Insurance Co. vs. Wires, 28 Vt. 93, Sec. 251.
- Aetna Life Ins. Co. vs. Amer. Surety Co., 34 Fed. Rep. 291, Sec. 123, 129, 240.
vs. Mabbett, 18 Wis. 677, Sec. 15, 106.
vs. Middleport, 124 U. S. 534, Sec. 259.
- Aetna Nat. Bank vs. Winchester, 43 Conn. 391, Sec. 74.
- Agnew vs. Bell, 4 Watts (Pa.) 31, Sec. 262.
- Abshmuhs vs. Bowyer, 39 Okla. 376, Sec. 146.
- Aiken vs. Leathers, 37 La. Ann. 482, Sec. 197.

(References are to sections.)

- Aitken Son & Co. vs. Lang's Admr., 106 Ky. 652, Sec. 119.
Alabama Ins. Co. vs. Anderson, 67 Ala. 425, Sec. 255.
Alabama Nat. Bank vs. Hunt, 125 Ala. 512, Sec. 115.
vs. Rivers, 116 Ala. 1, Sec. 10.
Alaska Salmon Co. vs. Standard Box Co., 158 Cal. 567, Sec. 45.
Albany vs. McNamara, 117 N. Y. 168, Sec. 173.
Alber vs. Froehlich, 39 O. S. 245, Sec. 185.
Albers Commission Co. vs. Spencer, 236 Mo. 608, Sec. 197.
Albright vs. Mills, 86 Ala. 324, Sec. 164.
Alcatraz Masonic Assn. vs. U. S. Fidelity & Guaranty Co., 3 Cal. App. 338, Sec. 76-a.
Alcoy Ry. vs. Greenhill, 41 London Solicitors Jour. 330, Sec. 117.
Aldred's Estate, 229 Pa. 627, Sec. 8.
Aldrich vs. Aldrich, 56 Vt. 324, (Sec. 262, 276.
vs. Ames, 9 Gray 76, Sec. 34.
Aldricks vs. Higgins, 16 Serg. & R. 212, Sec. 18, 60.
Alexander vs. Byrd, 85 Va. 690, Sec. 114.
vs. Hutchinson, 9 Ala. 825, Sec. 204.
vs. Jacoby, 23 O. S. 358, Sec. 201.
Alexander Lumber Co. vs. Aetna Co., 296 Ill. 500, Sec. 131.
Alexandria vs. Corse, 2 Cranch C. C. 363, Sec. 159.
Alford vs. Baxter, 36 Vt. 158, Sec. 114.
Alger vs. Thacher, 19 Pick. 51, Sec. 138.
Allegheny Valley R. Co. vs. Dickey, 131 Pa. 86, Sec. 246.
Allen vs. Berryhill, 27 Iowa 534, Sec. 104.
vs. Brown, 5 Lans. (N. Y.) 511, Sec. 197.
vs. Commonwealth, 90 Va. 356, Sec. 229.
vs. Danielson, 15 R. I. 480, Sec. 252.
vs. Houlden, 6 Beav. 148, Sec. 105.
vs. Kellam, 94 Pa. 253, Sec. 183, 189.
vs. Marney, 65 Ind. 398, Sec. 74, 109, 127.
vs. Morgan, 5 Humph. (Tenn.) 624, Sec. 11.
vs. O'Donald, 23 Fed. Rep. 573, Sec. 98, 99.
vs. Powell, 108 Ill. 584, Sec. 249.
vs. Ramey, 4 Strob. Law (S. C.) 30, Sec. 161.
vs. Rightmere, 20 Johns 365, Sec. 67.
vs. Rundle, 50 Conn. 9, Sec. 63.
vs. Sharpe, 37 Ind. 67, Sec. 97.
vs. State, 6 Blackf. (Ind.) 252, Sec. 156.
vs. State, 61 Ind. 268, Sec. 158.
vs. Thompson, 10 N. H. 32, Sec. 41.
vs. Wood, 3 Fred. Eq. (N. C.) 386, Sec. 262.
vs. Woodard, 125 Mass. 400, Sec. 118.
Aller vs. Aller, 40 N. J. L. 446, Sec. 122.
Alliance Trust Co. vs. Stewart, 115 Mo. 236, Sec. 103, 197.
Allies vs. Probyn, 2 Cromp. M. & R. 408, Sec. 93.
Allison vs. Sutherlin, 50 Mo. 274, Sec. 244.
Alsop vs. Price, 1 Doug. 160, Sec. 100.
American Agricultural Chemical Co. vs. Elmsworth, 109 Me. 195, Sec. 66.

(References are to sections.)

- American Bonding Co. vs. Morrow**, 80 Ark. 49, Sec. 233.
 vs. Pueblo Investment Co., 150 Fed. 17, Sec. 17.
 vs. Reynolds, 203 Fed. 356, Sec. 248.
 vs. Rudolph, 53 Col. 389, Sec. 190.
- American Bonding & Trust Co. vs. Milwaukee Harvester Co.**, 91 Md. 733, Sec. 129, 144.
- American Brewing Co. vs. Talbot**, 125 Mo. 388, Sec. 181.
- American Building & Loan Assn. vs. Waleen**, 52 Minn. 23, Sec. 131.
- American Credit Indemnity Co. vs. Cassard**, 83 Md. 272, Sec. 52.
- American Exchange Bank vs. Seaverns**, 121 Ill. App. 480, Sec. 66.
- American Exchange National Bank vs. Goubert**, 210 N. Y. 421, Sec. 194.
- American Fidelity Co. vs. East Ohio Sewer Pipe Co.**, 101 N. E. 671, Sec. 261.
- American Investment Co. vs. Marquam**, 62 Fed. Rep. 960, Sec. 112.
- American Iron & Steel Mfg. Co. vs. Beall**, 101 Md. 423, Sec. 85, 94.
- American National Bank vs. Fidelity & Dep. Co.**, 58 S. E. 867, Sec. 248.
- American Radiator Co. vs. American Bonding Co.**, 72 Neb. 100, Sec. 23-a.
- American Surety Co. vs. Boyle**, 65 O. S. 486, Sec. 263.
 vs. Folk, 124 Tenn. 139, Sec. 233.
 vs. Gaskill, 85 Vt. 358, Sec. 153.
 vs. Koen, 49 Tex. Civ. App. 98, Sec. 18, 188.
 vs. Nelson, 77 Minn. 402, Sec. 236.
 vs. Pacific Surety Co., 81 Conn. 252, Sec. 137.
 vs. Pauly, 170 U. S. 133, Sec. 106, 190, 233, 238, 242.
 vs. Raeder, Assignee, 15 O. C. C. 47, Sec. 131.
 vs. San Antonio Loan & Trust Co., 98 S. W. 387, Sec. 76-a.
 vs. Scott, 18 Okl. 264, Sec. 76-a.
 vs. Shallenberger, 183 Fed. 636, Sec. 13, 233.
 vs. Thurber, 121 N. Y. 655, Sec. 128.
 vs. Thurber, 162 N. Y. 244, Sec. 236.
 vs. United States, 127 Ala. 349, Sec. 243.
- American Telegraph Co. vs. Lennig**, 139 Pa. 594, Sec. 132.
- Ames vs. Foster**, 106 Mass. 400, Sec. 39.
 vs. Huse, 55 Mo. App. 422, Sec. 245.
 vs. Maclay, 14 Iowa 281, Sec. 103, 177.
- Amicable Mut. Life Ins. Co. vs. Sedgwick**, 110 Mass. 163, Sec. 76, 132.
- Amick vs. Woodworth**, 58 O. S. 86, Sec. 244.
- Amis vs. Bank of Kentucky**, 8 La. Ann. 441, Sec. 196.
- Amherst Bank vs. Root**, 2 Met. 522, Sec. 174.
- Ammons vs. Whitehead**, 31 Miss. 99, Sec. 186.
- Amory vs. Francis**, 16 Mass. 309, Sec. 252.
- Anaheim Co. vs. Parker**, 101 Cal. 483, Sec. 106.
- Anderson vs. Anderson**, 55 Mo. App. 268, Sec. 197.
 vs. Belbenger, 87 Ala. 334, Sec. 2, 20, 74, 133.
 vs. Blakely, 2 Watts & Serg. (Penn.) 237, Sec. 50.
 vs. Brown, 9 O. 151, Sec. 147.
 vs. Hayman, 1 H. Bl. 120, Sec. 36.
 vs. Meeker Co. Commrs., 46 Minn. 237, Sec. 181.

(References are to sections.)

- Anderson vs. Mannon, 7 B. Mon. (Ky.) 217, Sec. 83.
 vs. Rhea, 7 Ala. 104, Sec. 181.
 vs. Southern Ry. Co., 9 Ga. App. 199, Sec. 22.
 vs. Soward, 40 O. S. 325, Sec. 11.
 vs. Spence, 72 Ind. 315, Sec. 34.
 vs. Walton, 35 Ga. 202, Sec. 280.
- Andrews vs. Estes, 11 Me. 267, Sec. 142.
 vs. Pope, 126 N. C. 472, Sec. 67.
 vs. Smith, 2 C. M. & R. 627, Sec. 40.
 vs. Varrell, 46 N. H. 17, Sec. 117.
- Annett vs. Terry, 35 N. Y. 256, Sec. 221.
- Anselm vs. Groby, 62 Mo. App. 421, Sec. 182.
- Anthony vs. Capell, 53 Miss. 350, Sec. 102.
- Antisdel vs. Williamson, 165 N. Y. 372, Sec. 79, 81.
- Appgar's Admr. vs. Hiler, 24 N. J. L. 812, Sec. 267, 283.
- Appolinaris Co. vs. Venable, 136 N. Y. 46, Sec. 193.
- Applewhite vs. Shaw, 4 Humph. (Tenn.) 93, Sec. 251.
- Arbogast vs. Hays, 98 Ind. 26, Sec. 260.
- Ardesco Oil Co. vs. No. Amer. Oil Co., 66 Pa. 375, Sec. 114.
- Argus Co. vs. Mayor of Albany, 55 N. Y. 495, Sec. 28.
- Armitage vs. Pulver, 37 N. Y. 494, Sec. 263.
- Armstrong vs. Gilchrist, 2 Johns. Cas. (N. Y.) 424, Sec. 280.
- Arnold vs. Arnold, 124 Ala. 550, Sec. 218.
 vs. Bryant, 8 Bush. (Ky.) 668, Sec. 8, 10.
 vs. Green, 116 N. Y. 566, Sec. 244.
- Arnot vs. Erie Ry. Co., 67 N. Y. 315, Sec. 11.
- Arnot's Admr. vs. Symonds, 85 Pa. St. 99, Sec. 8.
- Asevado vs. Orr, 100 Cal. 293, Sec. 192.
- Ash vs. Abdy, 3 Swanst. 664, Sec. 25.
- Ashford vs. Robinson, 8 Ired. Law 114, Sec. 27, 66.
- Ashley vs. Brasil, 1 Ark. 144, Sec. 182.
- Ashmore vs. Evans, 11 N. J. Eq. 151, Sec. 46.
- Asmussen vs. Post Ptg. & Pub. Co., 143 P. 396, Sec. 66.
- Assets Realization Co. vs. American Bonding Co., 88 O. S. 216, Sec. 263.
- Assignment of Richart, In re, 58 Ill. App. 91, Sec. 223.
- Atlanta National Bank vs. Douglass, 51 Ga. 205, Sec. 73.
- Atlantic Trust & Deposit Co. vs. Union Trust & Title Corp., 110 Va. 286,
 Sec. 15, 82, 105.
- Atlantic & Pacific Teleg. Co. vs. Barnes, 64 N. Y. 385, Sec. 107.
- Atlas Bank vs. Brownell, 9 R. I. 168, Sec. 107.
- Atlas Lumber Co. vs. Flint, 20 S. D. 118, Sec. 36.
- Atlas Shoe Co. vs. Bloom, 209 Mass. 563, Sec. 57.
- Att'y Gen., In re, 14 Fla. 277, Sec. 150.
- Atwood vs. Lester, 20 R. I. 660, Sec. 6.
- Auchampaugh vs. Schmidt, 70 Ia. 642, Sec. 95, 113.
- Augusta vs. Sweeney, 44 Ga. 463, Sec. 145.
- Aultman vs. Hefner, 67 Tex. 54, Sec. 117.
 vs. Smith, 52 Mo. App. 351, Sec. 118.

(References are to sections.)

- Aultman & Taylor Co. vs. Gorham, 87 Mich. 233, Sec. 16.
 Austin vs. Curtis, 31 Vt. 64, Sec. 86.
 vs. Dorwin, 21 Vt. 38, Sec. 93.
 vs. Gibson, 28 Up. Can. (C. P.) 554, Sec. 92.
 vs. Richardson, 1 Gratt. 310, Sec. 20.
 vs. Raiford, 68 Ga. 201, Sec. 222.
 vs. Vrooman, 128 N. Y. 229, Sec. 168.
 Averill vs. Louks, 6 Barb. 470, Sec. 23.
 Avery vs. Rowell, 59 Wis. 82, Sec. 11.
 Ayers vs. Dixon, 78 N. Y. 318, Sec. 23, 251.
 vs. Duggan, 57 Neb. 750, Sec. 187.
 vs. Harness, 1 O. 368, Sec. 109.
 vs. Toland, 7 Har. & John. (Md.) 3, Sec. 142.

B

- Baber vs. Hanie, 163 N. C. 588, Sec. 253, 274.
 Babcock, In re, 3 Story, 393, Sec. 115.
 Babcock vs. Carter, 117 Ala. 575, Sec. 275.
 vs. Meek, 45 Iowa 137, Sec. 46.
 Babbit vs. Finn, 101 U. S. 7, Sec. 187, 189.
 Bacon vs. Burnham, 37 N. Y. 614, Sec. 8.
 Backus vs. Coyne, 45 Mich. 584, Sec. 269, 271, 283.
 Bachelder vs. Fiske, 17 Mass. 464, Sec. 262, 273.
 Badger vs. Barnabee, 17 N. H. 120, Sec. 9.
 Badeley vs. Consolidated Bank, 34 Ch. Div. 536, Sec. 179.
 Baer's Appeal, 127 Pa. 360, Sec. 217.
 Baglin vs. Southern Surety Co., 41 App. D. C. 530, Sec. 236, 239.
 vs. Title Guaranty & Surety Co., 166 Fed. 356, Sec. 15.
 Bagot vs. State, 33 Ind. 203, Sec. 174.
 Bagott vs. Mullen, 32 Ind. 332, Sec. 267.
 Bagwell vs. Amer. Surety Co., 102 Mo. App. 707, Sec. 76-a.
 Bailey vs. Butterfield, 14 Me. 112, Sec. 175.
 vs. Croft, 4 Taunt. 611, Sec. 16.
 vs. Dennis, 135 Mo. App. 93.
 vs. Farmers Nat. Bank, 97 Ill. App. 66, Sec. 11.
 vs. Griffith, 40 Up. Can. (Q. B.) 418, Sec. 90.
 vs. New, 29 Ga. 214, Sec. 115.
 vs. Rosenthal, 56 Mo. 385, Sec. 186.
 vs. Sweeting, 9 C. B. N. S. 843, Sec. 28.
 Bain vs. Whitehaven, 3 H. L. Cases, 1, Sec. 47.
 Bainbridge vs. Wade, 16 Q. B. 89, Sec. 26, 50.
 Baker vs. Briggs, 8 Pick. 123, Sec. 113.
 vs. Bryan, 64 Ia. 561, Sec. 131.
 vs. Belvin, 122 N. C. 190, Sec. 180.
 vs. Kennett, 54 Mo. 82, Sec. 104.
 vs. Merriam, 97 Ind. 539, Sec. 103.
 vs. Moor, 63 Me. 443, Sec. 218.
 vs. Peterson, 300 Ill. 526, Sec. 143.
 vs. Robinson, 63 N. C. 191, Sec. 8, 10.

(References are to sections.)

- Baker vs. Rand, 13 Barb. (N. Y.) 152, Sec. 59.
 vs. Sheehan, 29 Minn. 235, Sec. 172.
 vs. Trotter, 73 Ala. 277, Sec. 58.
 Baker City vs. Murphy, 30 Oreg. 405, Sec. 153.
 Baker County vs. Huntington, 46 Oreg. 275, Sec. 23-a, 109, 123.
 Baldwin vs. Daly, 41 Wash. 416, Sec. 113.
 vs. Fleming, 90 Ind. 177, Sec. 264, 265.
 vs. Walker, 94 Ala. 514, Sec. 200.
 Baldwin Coal Co. vs. Davis, 62 Pac. Rep. (Col.) 1041, Sec. 40.
 Balch vs. Hooper, 32 Minn. 158, Sec. 220.
 Balfour vs. Crace, 2 Ch. 733, Sec. 71.
 Ballew vs. Roler, 124 Ind. 557, Sec. 248.
 Ballow vs. Wichita Co., 74 Tex. 339, Sec. 109.
 Ball vs. Gardner, 21 Wend. 270, Sec. 207.
 Ballantine vs. Yung Wing, 146 Fed. 621, Sec. 29, 47.
 Baltimore First Nat. Bank vs. Gerke, 68 Md. 449, Sec. 132.
 Baltimore & Ohio R. R. Co. vs. Bitner, 15 W. Va. 455, Sec. 117.
 vs. Gault, 60 Ill. App. 647, Sec. 163.
 vs. Jackson, 3 Atl. Rep. (Pa.) 100, Sec. 130.
 vs. Vonderwerker, 19 W. Va. 265, Sec. 181.
 vs. Walker, 45 O. S. 577, Sec. 251.
 Bank vs. Anderson, 65 Ia. 692, Sec. 106.
 vs. Booze, 75 Mo. App. 189, Sec. 101.
 vs. Buchanan, 87 Tenn. 32, Sec. 97.
 vs. Cresson, 12 Serg. & R. (Pa.) 306, Sec. 146.
 vs. Danckmeyer, 70 Mo. App. 168, Sec. 97.
 vs. Gaylord, 34 Iowa 246, Sec. 68.
 vs. Hall, 107 Pa. 583, Sec. 214.
 vs. Haskell, 51 N. H. 116, Sec. 113.
 vs. Haug, 82 Mich. 607, Sec. 252.
 vs. Jeffs, 15 Wash. 230, Sec. 101.
 vs. Johnson, 9 Ala. 622, Sec. 94.
 vs. Martin, 81 Kas. 794, Sec. 213.
 vs. Patterson, 78 Ky. 291, Sec. 252.
 vs. Peltz, 176 Pa. 513, Sec. 101.
 vs. Railway Co., 65 Iowa 692, Sec. 15.
 vs. Richmond, 235 Mo. 532, Sec. 105-11.
 vs. Sharp, 152 Ala. 589, Sec. 7.
 vs. Simpson, 90 N. C. 467, Sec. 100.
 vs. Sinclair, 60 N. H. 100, Sec. 67.
 vs. Walter, 104 Tenn. 11, Sec. 83.
 vs. Whitman, 66 Ill. 331, Sec. 94.
 Bank of Australasia vs. Reynell, 10 New Zealand, L. R. 257, Sec. 108.
 Bank of Biddeford vs. McKenney, 67 Me. 272, Sec. 92.
 Bank of Carrollton vs. Latting, 37 Okla. 8, Sec. 16.
 Bank of California vs. Union Packing Co., 60 Wash. 456, Sec. 66.
 Bank of Genessee vs. Patchin Bank, 13 N. Y. 312, Sec. 148.
 Bank of Limestone vs. Penick, 2 T. B. Mon. (Ky.) 98, Sec. 75.
 Bank of Missouri vs. Matson, 26 Mo. 243, Sec. 90.

(References are to sections.)

- Bank of Monroe vs. Gifford, 79 Iowa 300, Sec. 98, 193, 195.
 Bank of New Zealand vs. Wilson, 5 N. Z. L. R. S. C. 215, Sec. 77.
 Bank of Newberry vs. Stegall, 41 Miss. 142, Sec. 138.
 Bank of Tarboro vs. Fidelity & Deposit Co., 128 N. C. 366, Sec. 12, 223, 238, 240.
 Bank Cases, 92 Tenn. 437, Sec. 252.
 Banks vs. Speers, 103 Ala. 436, Sec. 223.
 vs. State, 62 Md. 88, Sec. 95.
 Bankers Surety Co. vs. Linder, 137 N. W. 496, Sec. 249.
 vs. Security Trust Co., 39 App. D. C. 354, Sec. 187.
 Barr vs. Mitchell, 7 Oreg. 347, Sec. 8.
 Barclay vs. Gooch, 2 Esp. 571, Sec. 282.
 Barker vs. C. P. & St. L. Ry. Co., 243 Ill. 482, Sec. 170.
 vs. Parker, 1 Durn. & E. 287, Sec. 52.
 vs. Scudder, 56 Mo. 272, Sec. 42.
 vs. Wheeler, 60 Neb. 470, Sec. 176.
 Barnard vs. Lloyd, 85 Cal. 131, Sec. 45.
 Barnes vs. Barrow, 61 N. Y. 39, Sec. 2.
 vs. Century Savings Bank, 149 Iowa 367, Sec. 15, 106.
 vs. Cushing, 168 N. Y. 542, Sec. 55.
 vs. Mowry, 129 Ind. 568, Sec. 115.
 vs. Reed, 84 Fed. Rep. 603, Sec. 65.
 vs. Sammons, 128 Ind. 596, Sec. 115.
 vs. State, 36 Tex. 332, Sec. 230.
 vs. Whitaker, 45 Wis. 204, Sec. 164.
 Barnett vs. Barnett, 83 Va. 504, Sec. 128.
 vs. Smith, 17 Ill. 565, Sec. 52.
 Barrett-Hicks Co. vs. Glas, 9 Cal. App. 491, Sec. 76-a.
 Barney vs. Forbes, 118 N. Y. 580, Sec. 16, 27, 57.
 vs. Saunders, 16 How. 535, Sec. 160.
 Barrows vs. Lane, 5 Vt. 161, Sec. 20.
 Bartlett & Kling vs. Illinois Surety Co., 142 Iowa 538, Sec. 76-a.
 Bartlett vs. Wheeler, 195 Ill. 445, Sec. 125.
 Bartram vs. Ohio & Big Sandy R. R. Co., 141 Ky. 100, Sec. 197.
 Barton vs. Brent, 87 Va. 385, Sec. 245.
 vs. Croydon, 63 N. H. 417, Sec. 255.
 vs. Ridgeway, 92 Va. 162, Sec. 166.
 vs. Thompson, 66 Iowa 526, Sec. 207.
 Barela vs. Tootle, 66 Pac. Rep. (Colo.) 299, Sec. 182, 189.
 Barber vs. Edelin, 9 Ky. L. Rep. 971, Sec. 197.
 vs. Gillson, 18 Nev. 89, Sec. 280.
 Bartholomew vs. First National Bank, 57 Kan. 594, Sec. 245.
 Bardwell vs. Lydall, 7 Bing. 489, Sec. 252.
 Barth vs. Graf, 101 Wis. 27, Sec. 280.
 Barge vs. Van Der Horck, 57 Minn. 497, Sec. 274.
 Barrington vs. Bank of Washington, 14 Serg. & R. 405, Sec. 130.
 Barry vs. Ransom, 12 N. Y. 462, Sec. 265.
 Barton vs. Matthews, 141 Ark. 262, Sec. 245.
 vs. Title Guaranty & Surety Co., 192 Mo. App. 561, Sec. 233.
 Bashford vs. Shaw, 4 O. S. 263, Sec. 68.

(References are to sections.)

- Baskin vs. Huntington, 130 N. Y. 313, Sec. 69, 119.
 Basham vs. Commonwealth, 76 Ky. 36, Sec. 122.
 Bash vs. Howald, 27 Okl. 462, Sec. 208.
 Bassett vs. Fidelity Co., 184 Mass. 210, Sec. 218.
 vs. O'Neil Coal Co., 140 Ky. 346, Sec. 16.
 vs. Perkins, 119 N. Y. S. 354, Sec. 51.
 Bastow vs. Bennett, 3 Camp. 220, Sec. 50, 59.
 Bateman vs. Butler, 124 Ind. 223, Sec. 42.
 Bateman Bros. vs. Mapell, 145 Cal. 241, Sec. 76-b.
 Battell vs. Matot, 58 Vt. 271, Sec. 46.
 Bateson vs. Gosling, L. R., 7 C. P. 9, Sec. 102.
 Bates vs. Killian, 17 S. C. 553, Sec. 202.
 Bates, In re, 118 Ill. 524, Sec. 252.
 Batard vs. Hawes, 2 El. & Bl. 287, Sec. 262.
 Bathgate vs. Haskin, 59 N. Y. 533, Sec. 258.
 Baubien vs. Stoney, 1 Speers Eq. (S. C.) 508, Sec. 101.
 Baugher vs. Duphorn, 9 Gilf (Md.) 314, Sec. 118.
 Baucus vs. Barr, 45 Hun 582, Sec. 218.
 Bausman vs. Credit Guarantee Co., 47 Minn. 377, Sec. 282.
 Bauschard vs. Fidelity & Casualty Co., 21 Pa. Sup. Ct. Rep. 370, Sec. 79, 93.
 Baxter vs. Ralston, In re, 18 N. B. 497, Sec. 252.
 Bay Co. vs. Brock, 44 Mich. 45, Sec. 148.
 Beard vs. Converse, 84 Ill. 515, Sec. 25.
 vs. Union Co., 71 Ala. 60, Sec. 117.
 Beardsley vs. Hawes, 71 Conn. 39, Sec. 6, 62.
 Beaird vs. Russ, 32 La. Ann. 304, Sec. 181.
 Beakley vs. Cunningham, 165 S. W. 259, Sec. 226.
 Bean vs. Parker, 17 Mass. 591, Sec. 149.
 vs. Valle, 2 Mo. 126, Sec. 27.
 Beaman vs. Russell, 20 Vt. 205, Sec. 31.
 Beach vs. Zimmerman, 106 Ind. 495, Sec. 84.
 Beal vs. Brown, 13 Allen, 114, Sec. 25, 279.
 Beall vs. New Mexico, 16 Wall. 535, Sec. 187.
 vs. Walker, 26 W. Va. 741, Sec. 244.
 Beasley vs. State, 53 Ark. 57, Sec. 230.
 Bearden vs. State, 89 Ala. 21, Sec. 231.
 Beaver vs. Slanker, 94 Ill. 175, Sec. 244, 250.
 vs. Beaver, 23 Pa. 167, Sec. 281.
 Beauchaine vs. McKinnon, 55 Minn. 318, Sec. 176.
 Becker vs. Keokuk Water Works, 79 Ia. 419, Sec. 131.
 vs. Krank, 77 N. Y. S. 665, Sec. 43.
 vs. Peóple, 164 Ill. 267, Sec. 189.
 Beckham vs. Drake, 2 H. L. 579, Sec. 135, 142.
 Beckley vs. Munson, 22 Conn. 290, Sec. 283.
 Beckwith vs. Talbot, 95 U. S. 289, Sec. 29.
 vs. Webber, 78 Mich. 290, Sec. 251.
 Becovitz vs. Saperstein, 46 Ind. App. 339, Sec. 215.
 Bechervaise vs. Lewis, L. R., 7 C. P. 372, Sec. 258.

(References are to sections.)

- Bedford vs. Kelley, 173 Mich. 492, Sec. 6, 83.
 Bedwell vs. Gephart, 67 Ia. 44, Sec. 98.
 Beebe vs. Dudley, 26 N. H. 249, Sec. 68.
 vs. Moore, 3 McLean, 387, Sec. 9.
 vs. Robinson, 52 Ala. 66, Sec. 145.
 Beeson vs. Howard, 44 Ind. 413, Sec. 126.
 Beers vs. Shannon, 73 N. Y. 292, Sec. 137.
 vs. Wolf, 116 Mo. 179, Sec. 76-a.
 Belden vs. Hurlbut, 94 Wis. 562, Sec. 23-a, 109, 127.
 Belloni vs. Freeborn, 63 N. Y. 383, Sec. 17, 50, 74, 128.
 Bell vs. Bruen, 1 How. 169, Sec. 49.
 vs. Jasper, 2 Ired. Eq. (N. C.) 597, Sec. 263.
 vs. Norwood, 7 La. 95, Sec. 53.
 vs. Paul, 35 Neb. 240, Sec. 131.
 vs. People, 94 Ill. 230, Sec. 222.
 vs. Rudolph, 70 Miss. 234, Sec. 224.
 vs. Walker, 54 Neb. 222, Sec. 187.
 vs. Western River Imp. Co., 60 Ky. 558, Sec. 206.
 Belmont Min. & Mil. Co. vs. Costigan, 21 Col. 465, Sec. 197.
 Bellinger vs. Thompson, 26 Oreg. 320, Sec. 218.
 Belleville Savings Bank vs. Bornman, 124 Ill. 200, Sec. 20.
 Bellevue Loan & Bldg. Assn. vs. Jeckel, 104 Ky. 159, Sec. 106.
 Bellows vs. Lovell, 5 Pick. 307, Sec. 116.
 Bemis vs. Spalding, 9 Ky. L. Rep. 764, Sec. 197.
 Bent vs. Bent, 43 Vt. 42, Sec. 209.
 vs. Cobb, 9 Gray 397, Sec. 22.
 Benton vs. Fletcher, 31 Vt. 418, Sec. 63.
 vs. Gibson, 1 Hill Law (S. C.) 56, Sec. 61.
 vs. Willard, 17 N. H. 593, Sec. 8.
 Benton County Sav. Bank vs. Boddicker, 117 Iowa 407, Sec. 23-a, 106.
 Benge's Admr. vs. Eversole, 156 Ky. 131, Sec. 115.
 Bennett vs. Brown, 20 N. Y. 99, Sec. 207.
 vs. Carey, 72 Iowa 476, Sec. 15.
 vs. Cook, 45 N. Y. 268, Sec. 261.
 vs. Draper, 139 N. Y. 266, Sec. 50.
 vs. Southern Bank, 61 Mo. App. 297, Sec. 205.
 vs. State, 58 Miss. 556, Sec. 156.
 vs. Whitney, 94 N. Y. 302, Sec. 172.
 Bensinger vs. Wren, 100 Pa. 500, Sec. 76, 80.
 Benjamin vs. Hillard, 23 How. 149, Sec. 81.
 Benham vs. Assurance Co., 7 Welsb. H. & G. 744, Sec. 110.
 Benedict vs. Olson, 37 Minn. 431, Sec. 115.
 Bentley vs. Dorcas, 11 O. S. 398, Sec. 181.
 Benne vs. Schnecko, 100 Mo. 250, Sec. 247, 249.
 Berkey Co. vs. Sylvania Co., 97 O. S. 73, Sec. 193.
 Berlin Nat. Bank vs. Guay, 76 N. H. 216, Sec. 98.
 Berman vs. Elm Loan & Sav. Co., 114 Md. 191, Sec. 95.
 Berton vs. Anderson, 56 Ark. 470, Sec. 91.
 Berryman vs. Manker, 56 Iowa 150, Sec. 75.
 Berry vs. Pullen, 69 Me. 101, Sec. 82, 83.

(References are to sections.)

- Berryhill vs. Keilmeyer, 33 Iowa 20, Sec. 188.
 Berghoff vs. Heckwolf, 26 Mo. 511, Sec. 212.
 Bergen vs. Stewart, 28 How. Pr. 6, Sec. 263.
 Berridge vs. Berridge, 44 Ch. Div. 168, Sec. 274.
 Best Brewing Co. vs. Klassen, 185 Ill. 37, Sec. 11, 182.
 Besshears vs. Rowe, 46 Mo. 501, Sec. 42.
 Bethune vs. Dozier, 10 Ga. 235, Sec. 20, 73.
 Betts vs. Mougin, 15 La. Ann. 52, Sec. 193.
 Beville vs. Boyd, 16 Tex. Civ. App. 491, Sec. 248.
 Bezzell vs. White, 13 Ala. 422, Sec. 274.
 Bick vs. Long, 15 Ind. App. 503, Sec. 202.
 Bicknell vs. Henry, 69 Wash. 408, Sec. 43.
 Biddinger vs. Pratt, 50 O. S. 719, Sec. 212.
 Bierce vs. Waterhouse, 219 U. S. 320, Sec. 213, 214.
 Bierma vs. Columbia Typewriter Mfg. Co., 179 Ill. App. 69, Sec. 211.
 Bigelow vs. Bridge, 8 Mass. 275, Sec. 153.
 vs. Comegys, 5 O. S. 256, Sec. 15.
 vs. Stearns, 19 Johns. 39, Sec. 168.
 vs. Stilphen, 35 Vt. 521, Sec. 74.
 Bigony vs. Tyson, 75 Pa. 157, Sec. 135.
 Bill vs. Bament, 9 M. & W. 36, Sec. 28.
 Billings vs. Sprague, 49 Ill. 509, Sec. 244.
 Billingslea vs. Ward, 39 Md. 48, Sec. 46.
 Binford vs. Adams, 104 Ind. 41, Sec. 259.
 vs. Grimes, 26 Ind. App. 481, Sec. 197.
 Bingham vs. Mears, 4 No. Da. 437, Sec. 118, 187.
 Birdsall vs. Heacock, 32 O. S. 177, Sec. 18, 50, 59.
 Birchell vs. Neaster, 36 O. S. 331, Sec. 40, 46.
 Bird vs. Munroe, 66 Me. 337, Sec. 47.
 Birkhead vs. Brown, 5 Hill (N. Y.) 635, Sec. 51.
 Bishop vs. Church, 2 Ves. 100, Sec. 69, 119.
 vs. Day, 13 Vt. 81, Sec. 115, 281.
 vs. Eaton, 161 Mass. 499, Sec. 66.
 vs. Freeman, 42 Mich. 533, Sec. 17.
 Bissig vs. Britton, 59 Mo. 204, Sec. 34.
 Bissell vs. Saxton, 66 N. Y. 55, Sec. 174.
 Bittick vs. Wilkins, 7 Heisk. (Tenn.) 307, Sec. 248.
 Bivins vs. Helsley, 4 Met. (Ky.) 78, Sec. 111.
 Bjoin vs. Anglim, 97 Minn. 527, Sec. 122.
 Black vs. Alberty, 89 O. S. 240, Sec. 52.
 vs. Kaiser, 91 Ky. 422, Sec. 224.
 vs. Oblender, 135 Pa. 526, Sec. 156.
 Black Masonry & Cont. Co. vs. Nat'l Surety Co., 61 Wash. 471, Sec. 76-a, 76-b.
 Black, Starr & Frost vs. Grabow, 216 Mass. 516, Sec. 66.
 Black River Bank vs. Page, 44 N. Y. 453, Sec. 116.
 Blackett vs. Crissop, 1 Lord Raym. 278, Sec. 139.
 Blackburn vs. Crowder, 108 Ind. 238, Sec. 215.

(References are to sections.)

- Blake vs. Cole, 22 Pick. 97, Sec. 265.
 vs. Downey, 51 Mo. 437, Sec. 279.
 vs. Traders Nat. Bank, 145 Mass. 13, Sec. 248, 261.
 Blakeney vs. Nalle & Co., 45 Tex. Civ. App. 635, Sec. 39.
 Blades vs. Dewey, 136 N. C. 176, Sec. 129.
 Blanding vs. Shepard, 101 App. Div. (N. Y.) 442, Sec. 63.
 Blauvelt vs. Kemon, 196 Pa. 128, Sec. 76-a.
 Blakely's Trustee vs. Bogard, 143 Ky. 377, Sec. 200.
 Blatchford vs. Millikin, 35 Ill. 434, Sec. 8.
 Blair vs. Perpetual Insurance Co., 10 Mo. 559, Sec. 80, 174.
 vs. Reid, 20 Tex. 310, Sec. 93.
 vs. Reading, 103 Ill. 375, Sec. 186.
 vs. Sanborn, 82 Tex. 686, Sec. 186.
 Blankman vs. Vallejo, 15 Cal. 638, Sec. 123.
 Blanchard vs. Brown, 42 Mich. 46, Sec. 203.
 vs. Blanchard, 201 N. Y. 134, Sec. 249.
 Bland vs. Creager, 13 B. Mon. (Ky.) 509, Sec. 200.
 Bless vs. Jenkins, 129 Mo. 647, Sec. 46.
 Blevins vs. State, 31 Ark. 53, Sec. 228.
 Blount vs. Hawkins, 19 Ala. 100, Sec. 41.
 Bloomington Min. Co. vs. Searles, 63 N. J. L. 47, Sec. 77.
 Block vs. Blum, 33 Ill. App. 643, Sec. 182.
 Blume vs. Bowman, 2 Ired. (N. C.) 338, Sec. 127.
 Blydenburgh vs. Bingham, 38 N. Y. 374, Sec. 98.
 Board of Commissioners vs. Branham, 57 Fed. Rep. 179, Sec. 79.
 vs. Gray, 61 Minn. 242, Sec. 151.
 Board of Education vs. Fudge, 4 Ga. App. 637, Sec. 18.
 vs. Jewell, 44 Minn. 427, Sec. 166.
 vs. National Surety Co., 183 Mo. 166, Sec. 137.
 vs. Quick, 99 N. Y. 139, Sec. 152.
 vs. Robinson, 81 Minn. 305, Sec. 23-a, 156.
 vs. Thompson, 33 O. S. 321, Sec. 16.
 vs. U. S. Fidelity & Guar. Co., 155 Mo. App. 109,
 Sec. 17.
 Board of School Directors vs. Brown, 33 La. Ann. 383, Sec. 148.
 Board of Supervisors vs. Clark, 92 N. Y. 391, Sec. 152.
 vs. Ehlers, 45 Wis. 281, Sec. 154.
 vs. Pabst, 70 Wis. 352, Sec. 154.
 Boals vs. Nixon, 26 Ill. App. 517, Sec. 43.
 Boalt vs. Brown, 13 O. S. 364, Sec. 72.
 Boaler vs. Mayor, 19 C. B. N. S. 76, Sec. 92.
 Boatmen's Bank vs. Johnson, 24 Mo. App. 316, Sec. 102.
 Boardman vs. Larrabee, 51 Conn. 39, Sec. 82.
 Boaz vs. Milliken, 4 Ky. L. Rep. 700, Sec. 189.
 Boatwright vs. Stewart, 37 Ark. 614, Sec. 203, 208.
 Bobbott vs. Shryer, 70 Ind. 513, Sec. 26.
 Bockenstead vs. Perkins, 73 Iowa 23, Sec. 156, 224.
 Bocard vs. State, 79 Ind. 270, Sec. 160.
 Boehne vs. Murphy, 46 Mo. 57, Sec. 59.

(References are to sections.)

- Bohannon vs. Combs, 12 B. Mon. (Ky.) 563, Sec. 246.
 Boise City vs. Randall, 66 Pac. 938, Sec. 205.
 Bole vs. Bogardis, 86 Pa. 37, Sec. 114.
 Boley vs. Lake St. Elevated R. R. Co., 64 Ill. App. 305, Sec. 125.
 Bolles vs. Bird, 12 Colo. App. 78, Sec. 187.
 Bolling vs. Tate, 65 Ala. 417, Sec. 197.
 Boltz's Estate, 133 Pa. 77, Sec. 248, 249.
 Bond vs. Farwell Co., 172 Fed. 58, Sec. 60, 65.
 vs. Armstrong, 88 Ind. 65, Sec. 96.
 Bone vs. Smith, 164 S. W. 922, Sec. 43.
 Bonney vs. Seely, 2 Wend. 481, Sec. 282.
 Booth vs. Irving Nat. Ex. Bank, 116 Md. 668, Sec. 49, 61, 67, 66.
 vs. Powers, 56 N. Y. 22, Sec. 74.
 vs. Storrs, et al., 75 Ill. 438, Sec. 15, 105.
 Boothbay vs. Giles, 68 Me. 160, Sec. 146.
 Boone vs. Jones, 54 Iowa 699, Sec. 21, 148, 174.
 vs. State, 61 Ind. 379, Sec. 148.
 Boom vs. St. Paul, etc., 33 Minn. 253, Sec. 212.
 Boppart vs. Surety Co., 140 Mo. App. 675, Sec. 76-a, 233.
 Borden vs. Houston, 2 Tex. 594, Sec. 19.
 Boston Duck Co. vs. Dewey, 6 Gray 446, Sec. 46.
 Boston & Sandwich Glass Co. vs. Moore, 119 Mass. 435, Sec. 60.
 Bosman vs. Akeley, 39 Mich. 710, Sec. 63.
 Bostwick vs. Van Voorhis, 91 N. Y. 353, Sec. 15, 71, 123.
 Boswell vs. Colquitt, 73 Ga. 63, Sec. 232.
 Bott vs. Barr, 95 Ind. 243, Sec. 40.
 Bottfield vs. Gordon, 190 Mass. 567, Sec. 91.
 Bottoms vs. Leonards, 21 Ky. L. Rep. 862, Sec. 275.
 Boulton vs. Stubbs, 16 Ves. 20, Sec. 92.
 Boulden vs. Estey, 92 Alb. 182, Sec. 188.
 Bourne vs. Stevenson, 58 Me. 499, Sec. 217.
 Boulware vs. Hartsook, 83 Va. 679, Sec. 264.
 Boutin vs. Etsell, 110 Wis. 276, Sec. 269, 271.
 Bowmaker vs. Moore, 7 Price 223, Sec. 81.
 Bower vs. Jones, 128 N. W. 470, Sec. 16.
 Bowden vs. Derby, 97 Me. 536, Sec. 170.
 Bowers vs. Beck, 2 Nev. 139, Sec. 202.
 vs. Fleming, 67 Ind. 541, Sec. 163.
 Bowker vs. Bull, 1 Sim. (N. S.) 29, Sec. 250.
 Bowen vs. Hoskins, 45 Miss. 183, Sec. 270.
 Bowman vs. Blodgett, 2 Met. 308, Sec. 279.
 Boyd Tobacco Warehouse Co. vs. Terrill, 76 Ky. 463, Sec. 46.
 Boyd vs. Bell, 69 Tex. 735, Sec. 119.
 vs. Brooks, 34 Beav. 7, Sec. 279.
 vs. Parker, 43 Md. 183, Sec. 255.
 vs. Snyder, 49 Md. 325, Sec. 66.
 Boyden vs. United States, 13 Wall. 17, Sec. 167.
 Boyce vs. Murphy, 91 Ind. 1, Sec. 37.
 Boylston Bottling Co. vs. O'Neill, 231 Mass. 498, Sec. 138.

(References are to sections.)

- Bardley** vs. Burwell, 3 Denio (N. Y.) 61, Sec. 262, 275.
 vs. Fisher, 13 Wallace 335, Sec. 168.
 vs. Mann, 37 Mich. 1, Sec. 74.
 vs. Richardson, 23 Vt. 720, Sec. 44.
Bradley Eng. & Mfg. Co. vs. Heyburn, 56 Wash. 628, Sec. 8, 91-a.
Braddock vs. Wertheimer, 68 Ark. 423, Sec. 67.
Bradford vs. McCormick, 71 Ia. 129, Sec. 141.
Brammum Lumber Co. vs. Pickard, 33 Ind. App. 484, Sec. 73.
Brandup vs. Brazier, 111 Minn. 376, Sec. 76-a.
Bradford vs. Watson, 65 Fla. 461, Sec. 218.
Bradshaw vs. Barber, 125 Minn. 479, Sec. 50.
Bragg vs. Patterson, 85 Ala. 233, Sec. 249, 280.
 vs. Shain, 49 Cal. 131, Sec. 79.
Brant vs. Barnett, 10 Ind. App. 653, Sec. 16.
Bray vs. Parcher, 80 Wis. 16, Sec. 41.
Brady vs. Reynolds, 13 Cal. 32, Sec. 69.
Brackett vs. Rich, 23 Minn. 485, Sec. 63.
Bradbury vs. Morgan, 1 Hurl. & Colt. 249, Sec. 71.
Brand vs. Johnrowe, 60 Mich. 210, Sec. 133.
Brainard vs. Jones, 18 N. Y. 35, Sec. 137, 214.
Bradburne vs. Botfield, 14 M. & W. 559, Sec. 143.
Brayton vs. Town, 12 Iowa 346, Sec. 170.
Braithwaite vs. Jordan, 5 N. D. 196, Sec. 181.
Braiden vs. Mercer, 44 O. S. 339, Sec. 226.
Brandon vs. Brandon, 3 De G. & J. 524, Sec. 244.
Braun vs. Crew, 183 Cal. 728, Sec. 90.
Branght vs. Griffith, 16 Iowa 26, Sec. 248, 249, 284.
Brandenburg vs. Flynn, 12 B. Mon. (Ky.) 397, Sec. 254, 263.
Bramble vs. Ward, 40 O. S. 267, Sec. 94.
Bree vs. Holbech, 2 Doug. 665, Sec. 141.
Breed vs. Hillhouse, 7 Conn. 523, Sec. 16, 57, 67.
 vs. Weed, 130 Wis. 264, Sec. 188.
Brent vs. Green, 6 Leigh (Va.) 16, Sec. 22.
Brewster vs. Balch, 41 N. Y. Super. Ct. 63, Sec. 217.
Brewer vs. Horst Lachmund Co., 127 Cal. 643, Sec. 30.
Breckett vs. Addyman, 9 Q. B. Div. 783, Sec. 71.
Brengle vs. Bushey, 40 Md. 141, Sec. 86.
Breen vs. Kelley, 45 Minn. 352, Sec. 131.
Brennan vs. Clark, 29 Neb. 385, Sec. 135.
Breckinridge vs. Taylor, 5 Dana (Ky.) 110, Sec. 275.
Briggs vs. Boyd, 37 Vt. 534, Sec. 275.
 vs. Downing & Mathews, 48 Iowa 550, Sec. 9.
 vs. Latham, 36 Kans. 205, Sec. 16.
 vs. Manning, 80 Ark. 304, Sec. 221.
 vs. McDonald, 166 Mass. 37, Sec. 144.
 vs. Norris, 67 Mich. 325, Sec. 94.
 vs. Partridge, 64 N. Y. 357, Sec. 160.
Bright vs. Carpenter, 9 O. 139, Sec. 9, 10.
 vs. Lennon, 83 N. C. 183, Sec. 263, 271, 275.
 vs. McKnight, 1 Sneed (Tenn.) 158, Sec. 18, 50, 66.

(References are to sections.)

- Breitung vs. Lindauer, 37 Mich. 217, Sec. 85.
 Brigham vs. Carlisle, 78 Ala. 243, Sec. 46.
 Brillion Lumber Co. vs. Barnard, 131 Wis. 284, Sec. 106, 129.
 Bridges vs. Blake, 106 Ind. 332, Sec. 95.
 Bristol Milling & Mfg. Co. vs. Probasco, 64 Ind. 406, Sec. 97.
 Brick vs. Freehold Nat. Bank, 37 N. J. Law 307, Sec. 99.
 Brighton Bank vs. Smith, 94 Mass. 243, Sec. 137.
 Brite vs. State, 24 Tex. 219, Sec. 229.
 Brinson vs. Thomas, 2 Jones Eq. (N. C.) 414, Sec. 248.
 Bridgman vs. Johnson, 44 Mich. 491, Sec. 251.
 Brice vs. Watkins, 30 La. Ann. 21, Sec. 259.
 Brisendine vs. Martin, 1 Ired. Law (N. C.) 286, Sec. 269.
 Bridgeport Malleable Iron Co. vs. Iowa Cutlery Co., 130 Iowa 736, Sec. 50.
 Brogan vs. National Surety Co., 246 U. S. 257, Sec. 131.
 Brown vs. Ayer, 24 Ga. 288, Sec. 102.
 vs. Bradford, 30 Ga. 927, Sec. 103, 177.
 vs. Bradlee, 156 Mass. 28, Sec. 161.
 vs. Baldwin, 121 Mo. 126, Sec. 197.
 vs. Bank, 79 N. C. 244, Sec. 252.
 vs. Curtiss, 2 N. Y. 225, Sec. 42, 61, 67.
 vs. Conner, 32 N. C. 75, Sec. 185.
 vs. Davenport, 76 Ga. 799, Sec. 108.
 vs. First Nat. Bank, 112 Fed. 901, Sec. 96.
 vs. Houck, 41 Hun 16, Sec. 248.
 vs. Johnson, 127 Ala. 292, Sec. 75.
 vs. Kirk, 20 Mo. App. 524, Sec. 23, 251.
 vs. Kinsey, 81 N. C. 245, Sec. 126.
 vs. Lattimore, 17 Cal. 93, Sec. 153.
 vs. Melloon, 170 Iowa 49, Sec. 183.
 vs. Mo. Pac. Ry. Co., 85 Mo. 123, Sec. 191.
 vs. Phipps, 14 Miss. 51, Sec. 161.
 vs. Rathburn, 10 Ore. 158, Sec. 98.
 vs. Ray, 18 N. H. 102, Sec. 274.
 vs. Rouse, 125 Cal. 645, Sec. 248.
 vs. Russell, 166 Mass. 14, Sec. 145.
 vs. Shelby, 4 Ind. App. 477, Sec. 93.
 vs. Spiegel, 156 Mich. 138, Sec. 67.
 vs. State, 78 Ind. 239, Sec. 160.
 vs. Title Guaranty & Surety Co., 232 Pa. 337, Sec. 233, 238.
 vs. Vermont Mutnal Fire Ins. Co., 83 Vt. 161, Sec. 102.
 vs. Weaver, 76 Miss. 7, Sec. 164, 170.
 Brown Carriage Co. vs. Dowd, 155 N. C. 307, Sec. 98.
 Browne vs. Carr, 2 Russ. 600, Sec. 100.
 Brownell vs. Winnie, 29 N. Y. 400, Sec. 75.
 Bromberg vs. Fidelity & Dep. Co., 139 Ala. 338, Sec. 108.
 Browning, et al., vs. Merritt, et al., 61 Ind. 425, Sec. 10, 112.
 Brockway vs. Petted, 79 Mich. 620, Sec. 19.
 Brodie vs. St. Paul, 1 Ves. Jr. 326, Sec. 29.
 Brooking vs. Bank, 83 Ky. 431, Sec. 113.
 Brooks vs. Allen, 62 Ind. 401, Sec. 74.
 vs. Baker, 9 Daly (N. Y. C. P.) 398, Sec. 55.
 vs. Mangan, 86 Mich. 576, Sec. 168.

(References are to sections.)

- Brokaw vs. Kelsey, 20 Ill. 304, Sec. 57.
 Broome vs. The United States, 15 How. 143, Sec. 71, 119.
 Broad vs. Paris, 66 Tex. 119, Sec. 154.
 Broadway Nat. Bank vs. Baker, 176 Mass. 294, Sec. 11.
 Brounnty vs. Daniels, 23 Neb. 162, Sec. 182.
 Brough's Estate, 71 Pa. 460, Sec. 245.
 Bruce vs. Bickerton, 18 W. Va. 342, Sec. 273.
 vs. U. S., 17 How. 437, Sec. 156.
 Brumby vs. Barnard, 60 Ga. 292, Sec. 201.
 Brumback vs. German Bank, 46 Neb. 540, Sec. 109.
 Brubaker vs. Okeson, 36 Pa. 519, Sec. 113.
 Brunswick vs. Snow, 73 Me. 177, Sec. 172.
 Bryan vs. Berry, 6 Cal. 394, Sec. 22.
 vs. Cattell, 15 Ia. 538, Sec. 145.
 vs. United States, 90 Fed. Rep. 473, Sec. 170.
 Bryant vs. American Bonding Co., 77 O. S. 90, Sec. 233.
 vs. Crosby, 36 Me. 562, Sec. 103.
 vs. Kinyon, 127 Mich. 152, Sec. 122.
 vs. Rich, 104 Mich. 124, Sec. 42.
 Buckingham vs. Murray, 7 Houst. 176, Sec. 66.
 Bucki & Son Lumber Co. vs. Fidelity & Deposit Co., 109 Fed. Rep. 393,
 Sec. 208.
 Buckley vs. Van Diver, 70 Miss. 622, Sec. 208.
 Buckner vs. Stewart, 34 Ala. 529, Sec. 269.
 Buckmaster vs. Grundy, 8 Ill. 626, Sec. 271.
 Buchanan vs. Milligan, 125 Ind. 332, Sec. 185.
 vs. Meisser, 105 Ill. 638, Sec. 266.
 Buffalo Cement Co. vs. McNaughton, 90 Hun 74, Sec. 131.
 Buffalo Press Club vs. Greene, 86 Hun 20, Sec. 138.
 Buffendeau vs. Brooks, 28 Cal. 641, Sec. 139.
 Bugbee vs. Kendrick, 120 Mass. 437, Sec. 36.
 Buhner vs. Baldwin, 137 Mich. 263, Sec. 65, 66.
 Building Assn. vs. Cummings, 45 O. S. 664, Sec. 20, 121, 122.
 Bull vs. Allen, 19 Conn. 101, Sec. 115.
 vs. Coe, 77 Cal. 54, Sec. 95, 162.
 Bullard vs. Johns, 50 Ala. 382, Sec. 30.
 Bullock vs. Campbell, 9 Gill (Md.) 182, Sec. 280, 284.
 Bulger, In re, 45 Cal. 553, Sec. 145.
 Bullowa vs. Orgo, 57 N. J. Eq. 428, Sec. 44.
 Bullwinkle vs. Guttenburg, 17 Wis. 583, Sec. 163.
 Bulkeley vs. House, 62 Conn. 459, Sec. 264.
 Bulkeley vs. Stephens, 29 O. S. 620, Sec. 184.
 Bulmer vs. Jenkins, 3 How. Pr. 11, Sec. 210.
 Bunneman vs. Wagner, 16 Ore. 433, Sec. 41.
 Bunting vs. Gales, 77 N. C. 283, Sec. 145.
 Bunn vs. Jetmore, 70 Mo. 228, Sec. 149.
 vs. Lindsay, 95 Mo. 250, Sec. 259.
 Bunker vs. Osborn, 132 Cal. 480, Sec. 278.

(References are to sections.)

- Bunce vs. Bunce, 65 Pa. 106, Sec. 224.
 Burson vs. Andes & Wife, 83 Va. 445, Sec. 17.
 Burden vs. Knight, 82 Ia. 584, Sec. 45.
 Burt vs. Wilson, 28 Cal. 632, Sec. 46.
 Burgoyne vs. Ohio Life Ins. & Trust Co., 5 O. S. 586, Sec. 69, 119.
 Burke vs. Cruger, 8 Tex. 66, Sec. 86.
 vs. Lee, 59 Ga. 165, Sec. 247.
 Burkle vs. Luce, 1 N. Y. 163, Sec. 212.
 Burnhisel vs. Firman, 22 Wall. 170, Sec. 97.
 Burr vs. Boyer, 2 Neb. 265, Sec. 99, 257.
 Burton vs. Anderson, 5 Har. (Del.) 221, 222.
 vs. Hansford, 10 W. Va. 470, Sec. 10.
 Burgess vs. Badger, 124 Ill. 288, Sec. 128.
 vs. Doble, 149 Mass. 256, Sec. 188.
 Burchfield vs. Haffey, 34 Kan. 42, Sec. 137.
 Burnet vs. Courts, 5 Har. & John. (Md.) 78, Sec. 140.
 Burnett vs. Millsaps, 59 Miss. 333, Sec. 263, 267.
 vs. Stark, 136 N. W. 670, Sec. 197.
 vs. State, 18 Tex. App. 283, Sec. 229.
 Burns vs. Fidelity & Deposit Co., 96 Mo. App. 467, Sec. 76-a.
 vs. Follansbee, 20 Ill. App. 41, Sec. 143.
 vs. Parish, 3 B. Mon. (Ky.) 8, Sec. 279.
 Burr vs. Beckler, 264 Ill. 230, Sec. 11.
 Burrus vs. Cook, 93 S. W. 888, Sec. 249.
 Burroughs vs. Lott, 19 Cal. 125, Sec. 272.
 Bushnell vs. Bishop Hill Colony, 28 Ill. 204, Sec. 58.
 vs. Bushnell, 77 Wis. 435, Sec. 262, 269.
 Bustemente vs. Stewart, 55 Cal. 115, Sec. 197.
 Bush vs. Kirkbride, 131 Ala. 405, Sec. 197.
 Busch vs. Fisher, 89 Mich. 192, Sec. 215.
 Bushong vs. Taylor, 82 Mo. 660, Sec. 261.
 Butcher vs. Stuart, 11 M. & W. 857, Sec. 38.
 Butler vs. Bennetts, 51 Mont. 27, Sec. 163.
 vs. United States, 21 Wall. 272, Sec. 127.
 vs. Wadley, 15 Ind. 502, Sec. 182, 190.
 Buttlar vs. Davis, 52 Tex. 74, Sec. 182.
 Byers vs. Alcorn, 6 Ill. App. 39, Sec. 277.
 vs. Hickman Grain Co., 112 Iowa 451, Sec. 54, 78.
 vs. State, 20 Ind. 47, Sec. 146.
 Byrne vs. Gardner, 33 La. Ann. 6, Sec. 208.
 vs. Riddell, 4 La. Ann. 3, Sec. 182.

C

- Cady vs. Shepard, 12 Wis. 639, Sec. 10.
 Cadwell vs. Colgate, 7 Barb. 253, Sec. 199.
 vs. Jans, 1 Mont. 570, Sec. 215.
 Caffery vs. Dudgeon, 38 Ind. 512, Sec. 211.
 Cahill Iron Works vs. Pemberton, 62 N. Y. S. 944, Sec. 57.
 Cahuzac vs. Samini, 29 Ala. 288, Sec. 66.

(References are to sections.)

- Cahall vs. Citizens Mnt. Bldg. Assn., 74 Ala. 539, Sec. 188.
 Cain vs. Harden, 1 Ore. 360, Sec. 181.
 vs. State, 55 Ala. 170, Sec. 232.
 vs. Vogt, 138 Iowa 631, Sec. 96.
 Cairnes vs. Knight, 17 O. S. 68, Sec. 135.
 Callbreath vs. Coyne, 48 Col. 199, Sec. 186.
 Calvert vs. London Dock Co., 2 Keen. 639, Sec. 76-b, 79.
 Calvo vs. Davies, 73 N. Y. 211, Sec. 23, 90.
 Calloway vs. Snapp, 78 Ky. 561, Sec. 100.
 Callender vs. Olcott, 1 Mich. 344, Sec. 147.
 Calkins vs. Chandler, 36 Mich. 320, Sec. 40.
 Calhoun vs. Hannan, 87 Ala. 277, Sec. 203.
 vs. Little, 106 Ga. 336, Sec. 168.
 Callahan vs. Saleski, 29 Ark. 216, Sec. 187.
 California Savings Bank vs. Amer. Sur. Co., 87 Fed. Rep. 118, Sec. 241.
 Calvert vs. Gordon, 3 Man. & Ry. 124, Sec. 119.
 Camp vs. Bostwick, 20 O. S. 337, Sec. 269, 276.
 vs. Simmons, 62 Ga. 73, Sec. 8, 10.
 Campbell vs. American Bonding Co., 172 Alt. 458, Sec. 218.
 vs. Baker, 46 Pa. 243, Sec. 61, 67.
 vs. Carroll, 35 Mo. App. 640, Sec. 192.
 vs. Chamberlain, 10 Iowa 337, Sec. 208.
 vs. Findley, 3 Humph. 330, Sec. 27.
 vs. Gates, 17 Ind. 126, Sec. 112.
 vs. Johnson, 41 O. S. 588, Sec. 15, 218.
 vs. People, 154 Ill. 595, Sec. 162.
 vs. Rothwell, 47 L. J. C. L. 144, Sec. 98.
 vs. Rotering, 42 Minn. 155, Sec. 141.
 Campbell Ptg. Press Co. vs. Powell, 78 Tex. 53, Sec. 111.
 Camden vs. Doremus, 3 How. 515, Sec. 63.
 vs. McKoy, 4 Ill. 437, Sec. 10.
 Cambridge Sav. Bank vs. Hyde, 131 Mass. 77, Sec. 73, 79.
 Cambria Iron Co. vs. Keynes, 56 O. S. 501, Sec. 59.
 Cameron vs. Burger, 60 Ore. 458, Sec. 231.
 vs. Haas Bros. Packing Co., 3 Ala. App. 520, Sec. 36.
 Canfield vs. City of Erie, 21 Mich. 160, Sec. 181.
 Cantril vs. Babcock, 11 Colo. 143, Sec. 213.
 Cape Girardeau Bell Tel. Co. vs. Hamil's Estate, 134 S. W. 1103, Sec. 259.
 Caperton vs. Gray, 4 Yerg. (Tenn.) 563, Sec. 30.
 Capehart vs. Mhoon, 5 Jones Eq. (N. C.) 178, Sec. 259.
 Capef vs. Butler, 2 Sim. & Stu. 457, Sec. 29, 257.
 Capen vs. Bartlett, 153 Mass. 346, Sec. 215.
 Carr vs. Askew, 94 N. C. 194, Sec. 224.
 vs. Davis, 64 W. Va. 522, Sec. 279.
 vs. Meade, 77 Va. 112, Sec. 176.
 vs. Smith, 129 N. C. 232, Sec. 264.
 vs. Sutton, 76 W. Va. 417, Sec. 232.

(References are to sections.)

- Carter vs. Black, 4 Dev. & Bat. Law (N. C.) 425, Sec. 279.
 vs. Fidelity & Deposit Co., 134 Ala. 369, Sec. 146.
 vs. Mulrein, 82 Cal. 167, Sec. 194.
 vs. Thorn, 18 B. Mon. (Ky.) 613, Sec. 137.
 vs. Tice, 120 Ill. 277, Sec. 225.
 vs. Young, 77 Tenn. 210, Sec. 218.
 vs. Zenblin, 68 Ind. 436, Sec. 40, 43.
- Carpenter vs. Broost, 2 Sandf. 537, Sec. 69.
 vs. Bowen, 42 Miss. 28, Sec. 258.
 vs. Davis, 72 Ill. 14, Sec. 46.
 vs. Kelly, 9 O. 106, Sec. 253.
 vs. King, 9 Met. 511, Sec. 113.
 vs. Longan, 16 Wall. 271, Sec. 51.
 vs. Minter, 72 Tex. 370, Sec. 248.
 vs. Oaks, 10 Rich. L. 17, Sec. 10.
 vs. Turrell, 100 Mass. 450, 452, Sec. 202.
- Carroll vs. Bowie, 7 Gill. (Md.) 34, Sec. 140.
 vs. McGee, 25 N. C. 18, Sec. 184, 189.
 vs. Partridge, 12 Mo. App. 583, Sec. 139.
- Cardell vs. McNiel, 21 N. Y. 336, Sec. 42.
- Carver vs. Carver, 77 Ind. 498, Sec. 19.
 vs. Carver, 115 Ind. 530, Sec. 188.
- Carson vs. Reid, 137 Cal. 253, Sec. 96.
- Carson Asen. vs. Miller, 16 Nev. 327, Sec. 77.
- Carey vs. State, 34 Ind. 105, Sec. 163.
- Carnahan vs. Tousey, 93 Ind. 561, Sec. 142.
- Carmichael vs. Holloway, 9 Ind. 519, Sec. 181.
- Carothers vs. McIlhenny, 63 Tex. 138, Sec. 204.
- Carithers vs. Stuart, 87 Ind. 424, Sec. 245.
- Carraway vs. Wallace, 17 Sou. Rep. (Miss.) 930, Sec. 214.
- Carlisle vs. Wilkins, 51 Ala. 371, Sec. 255.
- Case vs. Howard, 41 Iowa 479, Sec. 85.
 vs. Hulsebush, 122 Ala. 212, Sec. 170.
 vs. Luse, 28 Iowa 527, Sec. 58.
- Casey vs. Peebles, 13 Neb. 7, Sec. 21.
- Cass County vs. Amer. Ex. Bank, 11 N. D. 238, Sec. 114.
- Cass Co. vs. Beck, 76 Iowa 487, Sec. 139.
- Cason vs. Connor, 83 Tex. 26, Sec. 245.
- Casoni vs. Jerome, 58 N. Y. 315, Sec. 15.
- Casper vs. Kent Circuit Judge, 45 Mich. 251, Sec. 215.
 vs. People, 6 Ill. App. 28, Sec. 164.
- Cash vs. People, 32 Ill. App. 250, Sec. 164.
- Cassier vs. Fales, 139 Mass. 461, Sec. 172.
- Casky vs. Haviland, 13 Ala. 314, Sec. 174.
- Castling vs. Aubert, 2 East 325, Sec. 41.
- Casselberry vs. Warren, 40 Ill. App. 626, Sec. 110.
- Cathcart vs. Foulke, 13 Mo. 561, Sec. 275.
- Catlett vs. Brodie, 9 Wheat. 553, Sec. 179.

(References are to sections.)

- Cauthorn vs. Berry, 69 Mo. App. 404, Sec. 249.
 vs. Weisinger, 6 Ala. 714, Sec. 276.
- Couthron Lumber Co. vs. Hall, 76 Ark. 1, Sec. 36.
- Cavazos vs. Trevino, 6 Wall. 773, Sec. 49.
- Cawley, et al., vs. The People, 95 Ill. 249, Sec. 15, 20, 106, 150.
- Cayuga Bridge Co. vs. Magee, 2 Paige 22, 116, Sec. 179.
- Cellers vs. Macchem, 49 Ore. 186, Sec. 91-a.
- Central Banking & Surety Co. vs. U. S. Fid. & Guar. Co., 80 S. E. 121, Sec. 219.
- Central L. Co. vs. Kelter, 201 Ill. 503, Sec. 11.
- Central Savings Bank vs. Shine, 48 Mo. 456, Sec. 66.
- Chaddock vs. Vanness, 35 N. J. L. 517, Sec. 10.
- Chaffee vs. Jones, 19 Pick. 260, Sec. 8, 10.
 vs. U. S. Fid. & Guar. Co., 128 Fed. 918, Sec. 76-a.
- Chambers vs. Prewett, 172 Ill. 615, Sec. 255.
- Chase vs. Beraud, 29 Cal. 138, Sec. 186.
 vs. Hathorn, 61 Me. 505, Sec. 108.
 vs. Ingalls, 97 Mass. 524, Sec. 172.
 vs. McDonald, 7 Har. & John. 160, Sec. 2.
- Champion vs. Griffith, 13 O. 228, Sec. 8, 9.
- Champion I. Co. vs. American Bonding Co., 115 Ky. 863, Sec. 233.
- Champlain vs. People, 2 N. Y. 82, Sec. 231.
- Chalaron vs. McFarlane, 9 La. (Curry) 227, Sec. 20.
- Chafoin vs. Rich, 77 Cal. 476, Sec. 61.
- Charnock vs. Jones, 115 N. W. 1072, Sec. 259.
- Chapin vs. Lapham, 20 Pick. 467, Sec. 31.
 vs. Merrell, 4 Wend. 657, Sec. 265.
- Chadwick vs. Eastman, 53 Me. 12, Sec. 74, 75.
- Charlotte R. R. Co. vs. Gow, 59 Ga. 685, Sec. 107.
- Chapman vs. Bluck, 5 Scotts Rep. 515, Sec. 128.
- Chalfant vs. Payton, 91 Ind. 202, Sec. 138.
- Chancellor vs. Hoxsey, 41 N. J. L. 217, Sec. 142.
- Chandler vs. Higgins, 109 Ill. 602, Sec. 249, 251.
 vs. Rutherford, 101 Fed. 774, Sec. 165.
 vs. State, 1 Lea (Tenn.) 296, Sec. 163, 172.
 vs. Thornton, 4 B. Mon. (Ky.) 360, Sec. 188.
- Chandler Lumber Co. vs. Radke, 136 Wis. 495, Sec. 76, 80.
- Chamberlain vs. Beller, 18 N. Y. 115, Sec. 164.
 vs. Godfrey, 36 Vt. 380, Sec. 177.
- Charles vs. Haskins, 11 Iowa 329, Sec. 164.
 vs. Hoskins, 14 Iowa 471, Sec. 176.
- Charles City Plow Co. vs. Jones, 71 Iowa 234, Sec. 204.
- Chapline vs. Robertson, 44 Ark. 202, Sec. 206.
- Chapeze vs. Young, 87 Ky. 476, Sec. 264.
- Chester vs. Broderick, 131 N. Y. 549, Sec. 189.
 vs. Kingston Bank, 16 N. Y. 336, Sec. 257.
 vs. Leonard, 68 Conn. 495, Sec. 73, 79.
- Cheltenham Fire Brick Co. vs. Cook, 44 Mo. 29, Sec. 138.
- Cheyboygan vs. Erratt, 110 Mich. 156, Sec. 163.
- Chemical Bank vs. Armstrong, 59 Fed. Rep. 372, Sec. 252.
- Cherry vs. Wilson, 78 N. C. 164, Sec. 263.

(References are to sections.)

- Chicago vs. Agnew, 264 Ill. 288, Sec. 76a.
 Chicago A. & N. R. R. vs. Whitney, 143 Iowa 506, Sec. 197.
 Chicago B. & Q. Ry. vs. Bartlett, 120 Ill. 603, Sec. 130.
 Chicago vs. Gage, 95 Ill. 593, Sec. 21, 168, 174, 177.
 Chicago City Railway Co. vs. Howison, 86 Ill. 215, Sec. 196.
 Chicago Trust & Sav. Bank vs. Nordgren, 157 Ill. 633, Sec. 8.
 Chicago & A. R. R. Co. vs. Higgins, 58 Ill. 128, Sec. 130.
 Child vs. N. Y. & N. E. R. R. Co., 129 Mass. 170, Sec. 248.
 vs. Pearl, 43 Vt. 224, Sec. 25.
 vs. Powder Works, 44 N. H. 354, Sec. 280, 282.
 Childers vs. Talbott, 16 Pac. Rep. (N. M.) 275, Sec. 25.
 Chickasaw Co. vs. Pitcher, 36 Iowa 593, Sec. 85.
 Chilton vs. Chapman, 13 Mo. 470, Sec. 274.
 vs. Robbins, 4 Ala. 223, Sec. 89.
 Chipman vs. Todd, 60 Me. 282, Sec. 114.
 Chisenhall vs. Hines, 100 S. W. 362, Sec. 208.
 Chipstead vs. Porter, 63 Ga. 220, Sec. 172.
 Chipps vs. Hartnoll, 4 B. & S. 414, Sec. 279.
 Chitwood vs. Hatfield, 136 Mo. App. 688, Sec. 16.
 Chorn vs. Merrill, 9 La. Ann. 533, Sec. 10.
 Choate vs. Arrington, 116 Mass. 552, Sec. 218.
 vs. Jacobs, 136 Mass. 297, Sec. 217.
 vs. Thorndike, 136 Mass. 371, Sec. 218.
 Chrisman vs. Hodges, 75 Mo. 413, Sec. 49.
 vs. Jones, 34 Ark. 73, Sec. 263.
 vs. Rogers, 30 Ark. 351, Sec. 207.
 vs. Tuttle, 59 Ind. 155, Sec. 115.
 Christian & Gunn vs. Keen, 80 Va. 369, Sec. 73.
 Christal vs. Kelly, 88 N. Y. 285, Sec. 206.
 Church vs. Noble, 24 Ill. 291, Sec. 20, 121.
 vs. Simmons, 83 N. Y. 261, Sec. 189.
 Churchill vs. Abraham, 22 Ill. 456, Sec. 204.
 Chute vs. Pattee, 37 Me. 102, Sec. 83.
 Citizens Bank vs. Douglass, 161 S. W. 601, Sec. 43.
 vs. Elliott, 9 Kas. App. 797, Sec. 101.
 vs. Whinery, 110 Iowa 390, Sec. 96.
 vs. Wiegand, 12 Phila. Rep. 496, Sec. 130.
 Citizens Loan Assn. vs. Nugent, 40 N. J. L. 215, Sec. 129.
 Citizens Nat. Bank vs. Burch, 145 N. C. 316, Sec. 278.
 Citizens Trust, etc., Co. vs. Globe, etc., Fire Insurance Co., 229 Fed. 326,
 Sec. 130.
 Citizens Trust Co. vs. Tindle, 272 Mo. 681, Sec. 16.
 Citizens Trust & Guaranty Co. vs. Ohio Valley Tie Co., 138 Ky. 421,
 Sec. 197.
 City of Philadelphia vs. Ray, 266 Pa. 345, Sec. 73, 132, 238.
 City of Topeka vs. Federal Union Surety Co., 213 Fed. 958, Sec. 238.
 City Bank vs. Luckie, 5 Ch. App. 733, Sec. 256.
 vs. Young, 43 N. H. 457, Sec. 99.
 City National Bank vs. Dudgeon, 65 Ill. 11, Sec. 250.
 vs. Jordan, 139 Iowa 499, Sec. 15.
 vs. Phelps, 86 N. Y. 484, Sec. 18, 66.
 Clark vs. Bank of Hennessey, 14 Okla. 572, Sec. 122.
 vs. Barnard, 108 U. S. 436, 459, Sec. 136.
 vs. Billings, 59 Ind. 509, Sec. 97.

(References are to sections.)

- Clark vs. Bryan, 16 Md. 171, Sec. 206.
 vs. Bryce, 64 Ga. 486, Sec. 23-a.
 vs. Chamberlain, 112 Mass. 19, Sec. 29.
 vs. Clayton, 61 Cal. 634, Sec. 193.
 vs. First Nat. Bank, 57 Mo. App. 277, Sec. 248.
 vs. Fredenburg, 43 Mich. 263, Sec. 221.
 vs. Gerstley, 204 U. S. 504, Sec. 84.
 vs. Jones, 85 Ala. 127, Sec. 41.
 vs. Logan County, 138 Ky. 676, Sec. 163.
 vs. Mallory, 185 Ill. 227, Sec. 119.
 vs. Miller, 54 N. Y. 528, Sec. 172.
 vs. Osborn, 41 O. S. 28, Sec. 115.
 vs. Remington, 11 Met. 361, Sec. 68.
 vs. Sickler, 64 N. Y. 231, Sec. 96.
 vs. Thayer, 105 Mass. 216, Sec. 71.
 vs. Wilkinson, 50 Wis. 543, Sec. 156.
 vs. Wilson, 103 Mass. 219, Sec. 248.
- Clancy vs. Kenworthy, 74 Ia. 740, Sec. 164.
 vs. Piggott, 2 Ad. & Ell. 473, Sec. 26.
- Classon vs. Billman, 161 Ind. 610, Sec. 66.
- Claffin vs. Oström, 54 N. Y. 581, Sec. 51.
- Clagett vs. Salmon, 5 Gill. & Johns. (Md.) 314, Sec. 77.
- Clapp vs. Rice, 15 Gray 557, Sec. 114, 276.
- Clay vs. Edgerton, 19 O. S. 549, Sec. 61, 67.
 vs. Freeman, 74 Miss. 816, Sec. 255.
 vs. Severence, 55 Vt. 300, Sec. 279.
- Clay Center vs. Williamson, 79 Kan. 485, Sec. 196.
- Clay Lumber Co. vs. Hart's Branch Coal Co., 174 Mich. 613, Sec. 42.
- Clerk vs. Withers, 2 Ld. Raym. 1072, Sec. 187.
- Clements vs. Schuylkill R. R. Co., 132 Pa. 445, Sec. 135.
- Clinton Bank vs. Ayres, 16 O. 283, Sec. 78.
- Clopton vs. Spratt, 52 Miss. 251, Sec. 99.
- Clopton, Exr., vs. Hall, 51 Miss. 482, Sec. 9.
- Clough vs. Seay, 49 Iowa 114, Sec. 74.
- Clow vs. Derby, 98 Pa. 432, Sec. 98.
- Clowson vs. Barbieri, 4 Sneed 335, Sec. 10.
- Clute vs. Small, 19 Wend 238, Sec. 74.
 vs. Kines, 102 N. Y. 377, Sec. 17.
- Coan vs. Patridge, 98 N. Y. S. 570, Sec. 53.
- Cobb vs. Haynes, 9 B. Mon. (Ky.) 137, Sec. 263.
 vs. Page, 17 Pa. 469, Sec. 57.
- Coburn vs. Townsend, 103 Cal. 233, Sec. 146.
- Cocks vs. Barker, 49 N. Y. 107, Sec. 126.
- Cochrum vs. West, 122 Ind. 372, Sec. 244.
- Cochran vs. People's Ry. Co., 113 Mo. 350, Sec. 135.
 vs. Walker, 82 Ky. 220, Sec. 276.
 vs. Ward, 5 Ind. App. 89, Sec. 47.
 vs. Wood, 29 N. C. 215, Sec. 181.

(References are to sections.)

- Cochrane vs. Cushing, 124 Mass. 219, Sec. 100.
 Codman vs. Rogers, 10 Pick. 112, Sec. 178.
 vs. Vt. & C. R. Co., 16 Blatchf. 165, Sec. 51.
 Coe vs. Buehler, 110 Pa. 366, Sec. 66.
 vs. N. J. Midland Ry. Co., 31 N. J. Eq. 106, Sec. 245.
 vs. Vodges, 71 Pa. 383, Sec. 119.
 Coffin vs. Trustees, 92 Ind. 337, Sec. 16, 57.
 Cogburn vs. Spence, 15 Ala. 549, Sec. 172.
 Coggeshall vs. Ruggles, 62 Ill. 401, Sec. 282.
 Cohea vs. Commissioners, 15 Miss. 437, Sec. 95.
 Cohen vs. Wright, 22 Cal. 203, Sec. 145.
 Cohn vs. Lehman, 93 Mo. 574, Sec. 193.
 Cole vs. Dyer, 1 Crompt. & Jerv. 461, Sec. 26.
 vs. Fox, 83 N. C. 463, Sec. 112.
 vs. Justice, 8 Ala. 793, Sec. 258.
 vs. Malcomb, 66 N. Y. 363, Sec. 259.
 vs. Merchants' Bank, 60 Ind. 350, Sec. 61.
 vs. Smith, 29 La. Ann. 551, Sec. 112.
 Cole Co. vs. Dallmeyer, 101 Mo. 57, Sec. 146.
 Coleman vs. Fuller, 105 N. C. 328, Sec. 6.
 vs. State, 10 Md. 168, Sec. 229, 230.
 Colgrove vs. Tallman, 67 N. Y. 95, Sec. 23, 80, 116.
 Colt vs. Root, 17 Mass. 229, Sec. 31.
 vs. Sears Commercial Co., 20 R. I. 64, Sec. 248.
 Colter vs. Morgan, 12 B. Mon. (Ky.) 278, Sec. 152.
 College Park Elec. Belt Line vs. Ide, 15 Tex. Civ. App. 273, Sec. 57.
 Colwell vs. Lawrence, 38 N. Y. 74, Sec. 135.
 Collins vs. Everett, 4 Ga. 266, Sec. 10.
 vs. Huffman, 48 Wash. 184, Sec. 197.
 vs. Mayor, 3 Hun 680, Sec. 145.
 vs. Prosser, 1 Barn. & Cr. 682, Sec. 114.
 vs. Skillen, 16 O. S. 382, Sec. 156.
 vs. Trist, 20 La. Ann. 348, Sec. 10.
 Collier vs. Betterton, 87 Tex. 440, Sec. 135.
 vs. Windham, 27 Ala. 291, Sec. 139.
 Colby vs. Meservey, 85 Iowa 555, Sec. 196, 197.
 Colquitt vs. Smith, 65 Ga. 341, Sec. 229.
 Colcord vs. Sylvester, 6 Ill. 540, Sec. 195.
 Columbia Amusement Co. vs. Pine Beach Inv. Co., 109 Va. 325, Sec. 195.
 Columbia Avenue Trust Co. vs. King, 27 Pa. 308, Sec. 23a.
 Columbia Co. vs. Massie, 31 Oreg. 292, Sec. 154.
 Columbia, etc., R. R. Co. vs. Braillard, 12 Wash. 22, Sec. 183.
 Columbus, Hocking Valley & Toledo Ry. Co. vs. Burke, 54 O. S. 98, Sec. 193.
 Columbus Sewer Pipe Co. vs. Ganser, 58 Mich. 385, Sec. 50.
 Comey vs. United Surety Co., 217 N. Y. 268, Sec. 233.
 Commercial Bank vs. Henninger, 105 Pa. 496, Sec. 101.
 vs. Provident Inst., 59 Kas. 361, Sec. 51.
 vs. Wood, 56 Mo. App. 214, Sec. 90.
 Commercial & Farmers Nat. Bank vs. McCormick, 97 Md. 703, Sec. 93.

(References are to sections.)

- Commonwealth vs. Allen, 157 Ky. 6, Sec. 232.
 vs. Amer. Bonding & Tr. Co., 16 Pa. Super. Ct. 570, Sec. 224.
 vs. Brassfield, 7 B. Mon. (Ky.) 447, Sec. 174.
 vs. Ches. & Ohio Canal Co., 32 Md. 501, Sec. 245, 250.
 vs. Comly, 3 Pa. 372, Sec. 167.
 vs. Drewry, 15 Gratt. (Va.) 1, Sec. 153.
 vs. Dill, 1 Phila. Rep. 556, Sec. 220.
 vs. Evans, 74 Pa. 124, Sec. 145.
 vs. Fidelity & Deposit Co., 180 Fed. 292, Sec. 167.
 vs. Flemming, 15 Ky. L. Rep. 491, Sec. 232.
 vs. Godshaw, 13 Ky. L. Rep. 572, Sec. 160.
 vs. Green, 138 Mass. 200, Sec. 186.
 vs. Holmes, 25 Gratt. 771, Sec. 152.
 vs. Julius, 173 Pa. 322, Sec. 226.
 vs. Magnolia Villa Land Co., 163 Pa. 99, Sec. 200.
 vs. Meyer, 170 Pa. 380, Sec. 208.
 vs. Overby, 80 Ky. 208, Sec. 232.
 vs. Pray, 125 Pa. 542, Sec. 224.
 vs. Rogers, 53 Pa. 470, Sec. 223.
 vs. Swope, 45 Pa. 535, Sec. 161.
 vs. Stockton, 5 T. B. Mon. (Ky.) 192, Sec. 164.
 vs. Teevens, 143 Mass. 210, Sec. 231.
 vs. Terry, 63 Ky. 383, Sec. 232.
 vs. Toms, 45 Pa. 408, Sec. 154.
 vs. Wistar, 142 Pa. 373, Sec. 182.
- Comstock vs. Gage, 91 Ill. 328, Sec. 15.
 vs. Norton, 36 Mich. 277, Sec. 42.
- Comparee vs. Brockway, 11 Humph. 355, Sec. 10.
- Comer vs. Baldwin, 16 Minn. 172, Sec. 123.
- Concrete Steel Co. vs. Illinois Surety Co., 163 Wis. 41, Sec. 131.
- Conger vs. Babbet, 67 Iowa 13, Sec. 10.
- Conn vs. State, 125 Ind. 514, Sec. 76a, 126.
- Conaway vs. Sweeney, 24 W. Va. 643, Sec. 30.
- Connecticut Insurance Co. vs. Scott, 81 Ky. 540, Sec. 107.
- Connecticut Mutnal Life Ins. Co. vs. Scott, 81 Ky. 540, Sec. 53.
- Connecticut Life Ins. Co. vs. Chase, 72 Vt. 176, Sec. 106, 127.
- Concord vs. Pillsbury, 33 N. H. 310, Sec. 117.
- Conner vs. State, 30 Tex. 94, Sec. 232.
- Connor vs. Corson, 13 S. D. 550, Sec. 176.
- Cony vs. Barrows, 46 Me. 497, Sec. 177.
- Connelly vs. Bourg, 16 La. Ann. 108, Sec. 249.
- Consolidated Co. vs. Musgrave, 1 L. R. Ch. Div. 37 (1900), Sec. 279.
- Conover vs. Hill, 76 Ill. 342, Sec. 273.
- Cont. & C. Nat. Bank vs. Cobb, 200 Fed. 511, Sec. 115.
- Conwell vs. McCowan, 53 Ill. 363, Sec. 245, 250.
 vs. Voohees, 13 O. 523, Sec. 170.
- Cook vs. Caraway, 29 Kas. 41, Sec. 12.
 vs. Chapman, 41 N. J. Eq. 152, Sec. 196, 197.
 vs. Freudenthal, 80 N. Y. 205, Sec. 111.
 vs. Ligon, 54 Miss. 625, Sec. 185.
 vs. Southwick, 9 Tex. 615, Sec. 8.

(References are to sections.)

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 Coots vs. Farnsworth, 61 Mich. 497, Sec. 112.
 Coombs vs. Harford, 99 Me. 426, Sec. 129.
 Coope vs. Twynam, Turn. & Russ. 426, Sec. 263.
 Cooper, In re, 22 N. Y. 67, Sec. 145.
 Cooper vs. Middleton, 94 N. C. 86, Sec. 255.
 vs. Parker, 176 Ala. 122, Sec. 279.
 vs. Rhodes, 30 La. Ann. 533, Sec. 188.
 Cooper Process Co. vs. Chicago Bonding & Surety Co., 262 Fed. 66,
 Sec. 106, 127.
 Coon vs. McCormack, 69 Iowa 539, Sec. 186.
 Coons vs. Clifford, 58 O. S. 480, Sec. 255.
 Coonradt vs. Campbell, 29 Kas. 301, Sec. 188.
 Co-operative Assn. vs. Rohl, 32 Kan. 663, Sec. 182.
 Copis vs. Middleton, Turn. & Russ. Ch. Rep. 224, Sec. 249.
 Copeland vs. Dixie Lumber Co., 4 Ala. App. 230, Sec. 188.
 Copeland & Brantley vs. Cunningham, 63 Ala. 394, Sec. 20, 121, 194.
 Cornwell vs. Holly, 5 Rich. 47, Sec. 83.
 Cornell vs. The People, 37 Ill. App. 490, Sec. 108, 164.
 Coriell vs. Allen, 13 Iowa 289, Sec. 83.
 Corbett vs. Waterman, 11 Iowa 86, Sec. 90.
 Corporation of Huron vs. Armstrong, 27 Up. Can. (Q. B.) 533, Sec. III.
 Corn Exchange Bank vs. Blye, 102 N. Y. 305, Sec. 212.
 Corrigan vs. Foster, Admx., 51 O. S. 225, Sec. 218.
 Cortelyou vs. Hoagland, 40 N. J. Eq. 1, Sec. 34.
 vs. Maben, 40 Neb. 512, Sec. 201.
 Corkins vs. Collins, 16 Mich. 478, Sec. 41.
 Corydon Dep. Bank vs. McClure, 140 Ky. 149, Sec. 85.
 Cosgrove vs. Cummings, 195 Pa. 497, Sec. 122.
 Cosgrove Brewing & Malting Co. vs. Starrs, 5 Ont. 169, Sec. 54.
 Cosand vs. Bunker, 2 S. D. 294, Sec. 46.
 Costello vs. Bridges, 142 Pac. 687, Sec. 187.
 Costley vs. Allen, 56 Ala. 198, Sec. 154.
 Coster vs. Mesner, 58 Mo. 549, Sec. 83.
 Cotrell's Appeal, 23 Pa. 294, Sec. 249.
 Cotton vs. Alexander, 32 Kan. 339, Sec. 279.
 County of Glenn vs. Jones, 146 Cal. 518, Sec. 76b.
 County of Spokane vs. Allen, 9 Wash. 229, Sec. 152.
 County Board vs. Bateman, 102 N. C. 52, Sec. 154.
 County vs. Tower, 28 Minn. 45, Sec. 154.
 Coughran vs. Sundback, 13 S. D. 115, Sec. 181.
 Coulthart vs. Clementson, 5 Q. B. Div. 412, Sec. 71.
 Court of Probate vs. Smith, 16 R. I. 444, Sec. 223.
 Covey vs. Neff, 63 Ind. 391, Sec. 245.
 vs. Schiesswohl, 50 Colo. 68, Sec. 17.
 Coverdale vs. Alexander, 82 Ind. 503, Sec. 211.
 Cowles vs. Peek, 55 Conn. 251, Sec. 16, 62.
 vs. U. S. Fidelity & Guar. Co., 32 Wash. 120, Sec. 76a.
 Cowdin vs. Gottgetreu, 53 N. Y. 650, Sec. 36.
 Cowenhoven vs. Howell, 36 N. J. L. 323, Sec. 41.

(References are to sections.)

- Cowan vs. Baird, 77 N. C. 201, Sec. 111.
 vs. Roberts, 134 N. C. 415, Sec. 66, 109.
 vs. Telford, 5 Lea (Tenn.) 449, Sec. 255.
 Cowdery vs. Hahn, 105 Wis. 455, Sec. 76a.
 Cowgill vs. Linville, 20 Mo. App. 138, Sec. 248.
 Cowel vs. Anderson, 33 Minn. 374, Sec. 128.
 Cowles vs. U. S. F. & G. Co., 32 Wash. 120, Sec. 233.
 Cox vs. Brown, 51 N. C. 100, Sec. 67.
 vs. Mobile Co., 37 Ala. 320, Sec. 83.
 vs. Mulhollan, 6 Mart. (La.) 649, Sec. 187.
 vs. Taylor's Adm., 10 B. Mon. 17, Sec. 195.
 Craig vs. Parkis, 40 N. Y. 181, Sec. 63.
 vs. Phipps, 23 Miss. 240, Sec. 61.
 Craighead vs. Swartz, 219 Pa. St. 149, Sec. 281.
 Crane vs. Andrews, 10 Colo. 265, Sec. 188.
 vs. Camp, 12 Conn. 464, Sec. 169.
 vs. Pacific Heat & Power Co., 36 Wash. 95, Sec. 96.
 vs. Powell, 139 N. Y. 379, Sec. 25.
 vs. Weymouth, 54 Cal. 476, Sec. 189.
 vs. Wheeler, 48 Minn. 207, Sec. 63.
 Crane Co. vs. Specht, 39 Neb. 123, Sec. 50.
 Cramer vs. Title, 72 Cal. 12, Sec. 13.
 Craft vs. Isham, 13 Conn. 28, Sec. 66.
 Crafts vs. Mott, 4 N. Y. 603, Sec. 304.
 Cragoe vs. Jones, L. R. 8 Ex. 81, Sec. 102.
 Cranor vs. Reardon, 39 Mo. App. 306, Sec. 186.
 Cranmer vs. McSwords, 26 W. Va. 412, Sec. 282, 283.
 Cravey vs. State, 26 Tex. App. 84, Sec. 231.
 Crawford vs. Atlantic Coast Lumber Co., 89 S. C. 456, Sec. 193.
 vs. Gaulden, 33 Ga. 173, Sec. 99.
 vs. Howard, 9 Ga. 314, Sec. 170.
 vs. Owens, 79 S. C. 59, Sec. 23a.
 vs. Richeson, 101 Ill. 351, Sec. 261.
 vs. Sterling, 4 Esp. 207, Sec. 11.
 vs. Turnbaugh, Trustee, 86 O. S. 43, Sec. 118.
 Crawn vs. Commonwealth, 84 Va. 282, Sec. 156.
 Craythorne vs. Swinburne, 14 Ves. Jr. 164, Sec. 262, 264.
 Cremer vs. Higginson, 1 Mason 323, Sec. 54, 65.
 Creswell vs. Herr, 9 Col. App. 185, Sec. 184.
 vs. Woodside, 15 Col. App. 468, Sec. 201.
 Crears vs. Hunter, 19 Q. B. Div. 341, Sec. 57.
 Creager vs. Brengle, 5 Harr. & J. (Md.) 234, Sec. 247.
 Crim vs. Fitch, 53 Ind. 219, Sec. 31.
 vs. Fleming, 101 Ind. 154, Sec. 99.
 vs. Wilson, 61 Miss. 233, Sec. 103.
 Crist vs. Burlingame, 62 Barb. (N. Y.) 351, Sec. 60.
 Crittenden vs. Fiske, 46 Mich. 70, Sec. 60, 66.
 Crisfield vs. State, 55 Md. 192, Sec. 247.

(References are to sections.)

- Crosby vs. Bonchard, 82 Vt. 66, Sec. 299.
 vs. Woodberry, 37 Col. 1, Sec. 99.
- Cross vs. Ballard, 46 Vt. 415, Sec. 117.
 vs. Rowe, 22 N. H. 77, Sec. 78.
 vs. State Bank, 5 Ark. 525, Sec. 109.
- Crow vs. Conant, 90 Mich. 247, Sec. 218.
 vs. Crow, 53 Ky. 383, Sec. 222.
- Crowell vs. Hospital of St. Barnabas, 27 N. J. Eq. 650, Sec. 142.
- Crooks vs. Propp, 66 N. Y. S. 753, Sec. 58.
- Crook vs. People, 106 Ill. 237, Sec. 145.
- Cronin vs. Stoddard, 97 N. Y. 271, Sec. 150.
- Crounse vs. Syracuse, C. & N. Y. R. R. Co., 32 Hun 497, Sec. 197.
- Crouch vs. Edwards, 52 Ark. 499, Sec. 221.
- Crouse vs. Wagner, 41 O. S. 470, Sec. 264.
- Croswell vs. Labree, 81 Me. 44, Sec. 74.
- Crum vs. Wilson, 61 Miss. 233, Sec. 19.
- Cumming vs. Brown, 43 N. Y. 514, Sec. 164.
- Cudahy Packing Co. vs. Shephard, 37 Tex. Civ. App. 1, Sec. 76.
- Culver vs. Fidelity & Deposit Co., 149 Mich. 630, Sec. 185.
 vs. Reno Real Estate Co., 91 Pa. St. 367, Sec. 11, 148.
- Cummings vs. Gann, 52 Pa. 488, Sec. 209.
 vs. Little, 45 Me. 183, Sec. 98.
- Cumberland vs. Pennell, 69 Me. 357, Sec. 167.
- Cumberland Glass Mfg. Co. vs. Wheaton, 208 Mass. 425, Sec. 49, 66, 67.
- Cumberland Coal & Iron Co. vs. Hoffman, 39 Barb. 16, Sec. 195.
- Cunningham vs. Finch, 8 N. W. (Neb.) 168, Sec. 197.
 vs. Hawkins, 163 Mich. 317, Sec. 122.
 vs. Wrenn, 23 Ill. 62, Sec. 128.
- Curtis, In re, 64 Conn. 501, Sec. 49.
- Curtis vs. Brewer, 17 Pick. 513, Sec. 135.
 vs. National Bank, 39 O. S. 579, Sec. 221.
 vs. Parks, 55 Cal. 106, Sec. 275.
 vs. Smallman, 14 Wend. N. Y. 231, Sec. 62.
 vs. Tyler, 9 Paige 432, Sec. 255.
- Curtiss vs. Bachman, 110 Cal. 433, Sec. 197.
- Curiac vs. Packard, 29 Cal. 194, Sec. 96.
- Currier vs. Baker, 51 N. H. 613, Sec. 273, 276.
 vs. Fellows, 27 N. H. 366, Sec. 10.
- Curd vs. Forts, 9 Ky. 119, Sec. 122.
- Curry vs. Curry, 87 Ky. 667, Sec. 259.
 vs. Hale, et al., 15 W. Va. 867, Sec. 23.
- Curtin vs. Patton, 11 Serg. & R. 305, Sec. 11.
- Cushing vs. Cable, 48 Minn. 3, Sec. 50.
- Cutler vs. Balkoo, 136 Mass. 337, Sec. 18, 60.
- Cutter vs. Emery, 37 N. H. 567, Sec. 267.
- Cyclone Steam Snowplow Co. vs. Vulcan Iron Wks, 52 Fed. Rep. 920,
 Sec. 214.
- C. & W. Coal Co. vs. Liddell, 69 Ill. 639, Sec. 40, 46.

(References are to sections.)

D

- Daggett vs. Mensch, 141 Ill. 395, Sec. 185.
 Dahlman vs. Hammett, 45 Wis. 466, Sec. 16, 57.
 Dair vs. United States, 16 Wall. 1, Sec. 74, 109, 127.
 Daly vs. Busk Tunnel Ry. Co., 129 Fed. 513, Sec. 78a.
 vs. Old, 35 Utah 74, Sec. 15.
 Damon vs. Empire State Sur. Co., 161 App. Div. 875, Sec. 104, 106.
 Damron vs. Sweetser, 16 Ill. App. 339, Sec. 208.
 Dana vs. Conant, 30 Vt. 246, Sec. 63.
 Dana, Executor, vs. Parker, 27 Fed. 263, Sec. 143.
 Dane vs. Corduan, 24 Cal. 157, Sec. 115.
 vs. Gilmore, 51 Me. 544, Sec. 176.
 Dangel vs. Levy, 1 Idaho 722, Sec. 133.
 Dangler vs. Baker, 35 O. S. 673, Sec. 15, 57, 127.
 Daniel vs. Ballard, 2 Dana (Ky.) 296, Sec. 267.
 Daniel Co. vs. Dickey, 6 Ga. App. 543, Sec. 38.
 Daniels, et al., vs. Barney, 22 Ind. 207, Sec. 19, 138.
 Danker vs. Atwood, 119 Mass. 146, Sec. 20, 121.
 Darst vs. Bates, 95 Ill. 493, Sec. 42.
 Darby vs. Berney Natl. Bank, 97 Ala. 643, Sec. 115.
 Daum vs. Kehnest, 18 O. C. C. 1, Sec. 273.
 Davany vs. Koon, 45 Miss. 71, Sec. 173.
 Davenport vs. State Banking Co., 126 Ga. 136, Sec. 101.
 Davis vs. Banks, 45 Ga. 138, Sec. 40.
 vs. Barrington, 30 N. H. 517, Sec. 112.
 vs. Blackwell, 5 Ill. App. 32, Sec. 11.
 vs. Board of Commissioners of Stokes Co., 72 N. C. 441, Sec. 284.
 vs. Buckles, 89 Ill. 237, Sec. 108.
 vs. Commissioners, 72 N. C. 441, Sec. 104.
 vs. Davis, 69 Atl. 876, Sec. 259.
 vs. Gillett, 52 N. H. 126, Sec. 135.
 vs. Harding, 3 Allen, 302, Sec. 215.
 vs. Hoopes, 33 Miss. 173, Sec. 280.
 vs. O'Bryant, 23 Ind. App. 376, Sec. 183.
 vs. Old Colony R. R., 131 Mass. 258, Sec. 11.
 vs. Patrick, 141 U. S. 479, Sec. 39, 118, 187.
 vs. People, 1 Gilm. Ill. 409, Sec. 87.
 vs. Shafer, 50 Fed. 764, Sec. 49.
 vs. Shields, 26 Wend. 341, Sec. 30, 122.
 vs. Statte, 43 Ind. 103, Sec. 104.
 vs. South Carolina, 107 U. S. 597, Sec. 230.
 vs. Toulmin, 77 N. Y. 280, Sec. 274.
 vs. Wells, 104 U. S. 159, Sec. 5, 16, 48, 50, 61, 65, 68.
 Davis Sewing Machine Co. vs. Richards, 115 U. S. 524, Sec. 65.
 Davies vs. Carey, 72 Wash. 537, Sec. 39.
 vs. Funston, 45 Upper Can. (Q. B.) 369, Sec. 16, 57.
 vs. Humphries, 6 M. & W. 153, Sec. 269.
 vs. London & P. Marine Ins. Co., L. R. Ch. Div. 469, Sec. 106.

(References are to sections.)

- Dawe vs. Morris, 149 Mass. 188, Sec. 110.
 Dawson vs. Lee, 83 Ky. 49, Sec. 259.
 vs. State, 38 O. S. 1, Sec. 152.
 Day vs. Cloe, 4 Bush 563, Sec. 38.
 vs. Elmore, 4 Wis. 190, Sec. 99.
 vs. McPhee, 41 Col. 467, Sec. 187.
 vs. Ramey, 40 O. S. 446, Sec. 98.
 Dayton vs. Lynes, 30 Conn. 351, Sec. 147.
 Deal vs. Cochran, 66 N. C. 269, Sec. 81.
 Dean vs. Rice, 63 Kas. 691, Sec. 92.
 vs. Sedan Milling Co., 19 Cal. App. 28, Sec. 83.
 vs. Tallman, 105 Mass. 443, Sec. 36.
 vs. Walker, 107 Ill. 540, Sec. 36.
 Dean & Co. vs. Collins & Manhood, 15 N. D. 535, Sec. 23, 90.
 Dearborn vs. Richardson, 108 Mass. 565, Sec. 206.
 Deare vs. Soutten, L. R. 9 Eq. 151, Sec. 259.
 Deardorff vs. Foresman, 24 Ind. 481, Sec. 111.
 Deason vs. Gray, 189 Ala. 672, Sec. 170.
 Deatherage vs. Sheidley, 50 Mo. App. 490, Sec. 185.
 Deck vs. Works, 57 How. Pr. 292, Sec. 67.
 Decker vs. Decker, 9 Ala. App. 241, Sec. 181, 220.
 Dedham Bank vs. Chickering, 3 Pick. 335, Sec. 129.
 Dedge vs. Branch, 94 Ga. 37, Sec. 151.
 Dedrick vs. Den Bleyker, 85 Mich. 475, Sec. 90.
 Deering vs. Winchelsea, 2 B. & P. 270, Sec. 262, 263, 268.
 Deering & Co. vs. Mortell, 110 N. W. 86, Sec. 66.
 Deer Lodge Co. vs. At., 3 Mont. 168, Sec. 231.
 vs. U. S. Fid. & Guar. Co., 42 Mont. 315, Sec. 122, 148,
 149, 315,
 DeGreiff vs. Wilson, 30 N. J. Eq. 435, Sec. 176.
 DeJernette vs. Fidelity & Casualty Co., 98 Ky. 558, Sec. 239.
 Deisher vs. Gehre, 45 Kan. 583, Sec. 188.
 Deitzler vs. Mishler, 37 Pa. 82, Sec. 248.
 Delaware Ins. Co. vs. Pa. Fire Ins. Co., 126 Ga. 380, Sec. 43.
 Delaware, L. & W. R. R. Co. vs. Oxford Iron Co., 38 N. J. Eq. 151, Sec. 282.
 Delaware Co. Nat. Bank vs. King, 95 N. Y. S. 954, Sec. 48, 68.
 Demeritt vs. Rickford, 58 N. H. 523, Sec. 34.
 Demott vs. Field, 7 Cow. 58, Sec. 119.
 vs. Stockton, 32 N. J. Eq. 124, Sec. 255.
 Dempsey vs. Bush, 18 O. S. 376, Sec. 249, 261.
 Denio vs. State, 60 Miss. 949, Sec. 76, 152.
 Denton vs. Butler, 99 Ga. 264, Sec. 106.
 Dennie vs. Smith, 129 Mass. 143, Sec. 177.
 Dennis vs. Gillespie, 24 Miss. 581, Sec. 262.
 Denison University vs. Manning, 65 O. S. 138, Sec. 90.
 Dennison vs. Barney, 49 Colo. 442, Sec. 45.
 vs. Mason, 36 Me. 431, Sec. 182.
 Denier vs. Myers, 20 O. S. 336, Sec. 246.
 Denny vs. Reynolds, 24 Ind. 248, Sec. 218.

(References are to sections.)

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 Deobold vs. Opperman, 111 N. Y. 531, Sec. 16.
 Depot Realty Syndicate Co. vs. Enterprise Brewing Co., 87 Oregon 560, Sec. 11.
 Derosset vs. Bradley, 63 N. C. 17, Sec. 271.
 Desot vs. Ross, 95 Mich. 81, Sec. 259.
 Despres vs. Folz, 134 Ill. App. 111, Sec. 76.
 Detroit Sav. Bank vs. Ziegler, 49 Mich. 157, Sec. 132.
 Devol vs. Dye, 6 Ind. App. 257, Sec. 188.
 Dewey vs. Clark Invest. Co., 48 Minn. 130, Sec. 63.
 vs. Kavanaugh, 45 Neb. 233, Sec. 163.
 vs. Reed, 40 Barb. 16, Sec. 72.
 vs. State; 91 Ind. 173, Sec. 76a, 131.
 Dexter vs. Ohlander, 89 Ala. 262, Sec. 45.
 Dey vs. Martin, 78 Va. 1, Sec. 73.
 Dickason vs. Bell, 13 La. Ann. 249, Sec. 103.
 Dickerson vs. Ripley, 6 Ind. 128, Sec. 93.
 vs. Derrickson, 39 Ill. 574, Sec. 67.
 Diehl vs. Davis, 75 Kas. 38, Sec. 81.
 vs. Friester, 37 O. S. 473, Sec. 192.
 Dignowitty vs. Staacke, 25 S. W. (Tex. Civ. App.) 824, Sec. 185.
 Dillman vs. Nadelhoffer, 160 Ill. 121, Sec. 9, 63.
 Dills vs. Cecil, 4 Bush (Ky.) 579, Sec. 99.
 Dillon vs. Russell, 5 Neb. 484, Sec. 116.
 Dilley vs. State, 3 Idaho 285, Sec. 228.
 Dine vs. Donnelly, 121 S. W. 685, Sec. 248.
 Dinsmore vs. Sachs, 133 Md. 434, Sec. 255.
 vs. Tidball, 34 O. S. 411, Sec. 15, 106.
 Dinkins vs. Bailey, 23 Miss. 284, Sec. 220.
 District of Columbia vs. Gallaher, 124 U. S. 505, Sec. 128.
 vs. Petty, 37 App. D. C. 156, Sec. 152.
 District of Taylor vs. Morton, 37 Iowa 553, Sec. 166, 167.
 Dix vs. Morris, 1 Mo. App. 93, Sec. 218.
 Dixon vs. Spencer, 59 Md. 246, Sec. 85.
 Doane vs. Eldridge, 16 Gray 254, Sec. 151.
 Dobeff vs. Hutchinson, 3 Ad. & Ell. 355, Sec. 29.
 Dobie vs. Fidelity & Casualty Co., 95 Wis. 540, Sec. 281.
 Dobbs vs. The Justices, 17 Ga. 624, Sec. 174.
 Dock vs. Boyd, 93 Pa. 92, Sec. 40.
 Dodd vs. The State, 18 Ind. 56, Sec. 159.
 vs. Vucovich, 38 Mont. 188, Sec. 79.
 vs. Wilson, 4 Del. Ch. 399, Sec. 249.
 vs. Winn, 27 Mo. 501, Sec. 114.
 Dodge vs. Zimmer, 110 N. Y. 43, Sec. 42.
 Dodgson vs. Henderson, 113 Ill. 360, Sec. 81, 83.
 Doepfner vs. The State, 36 Ind. 111, Sec. 168.
 Dolbeer vs. Livingston, 100 Cal. 617, Sec. 124.
 Dole vs. Young, 24 Pick. 250, Sec. 1, 48.
 Doll vs. Crume, 41 Neb. 655, Sec. 131.
 Domestic S. M. Co. vs. Jackson, 15 B. J. Lea 418, Sec. 15.
 Ponley vs. Camp, 22 Ala. 659, Sec. 61.

(References are to sections.)

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 Donahue vs. Johnson, 9 Wash. 187, Sec. 197.
 Donnerberg vs. Oppenheimer, 15 Wash. 290, Sec. 119.
 Doran vs. Butler, 74 Mich. 643, Sec. 171.
 vs. Davis, 43 Iowa 86, Sec. 286.
 Dore vs. Covey, 13 Cal. 502, Sec. 181.
 Dorman vs. Bigelow, 1 Fla. 281, Sec. 27.
 Dorsey vs. Fidelity & Casualty Co., 98 Ga. 456, Sec. 239.
 Dorwin vs. Smith, 35 Vt. 69, Sec. 42.
 Dothard vs. Sheid, 69 Ala. 135, Sec. 208.
 Dougherty vs. Dore, 63 Cal. 170, Sec. 196.
 Doughty vs. Savage, 28 Conn. 146, Sec. 15.
 Douglass vs. Ferris, 138 N. Y. 192, Sec. 225.
 vs. Kessler, 57 Iowa 63, Sec. 224.
 vs. Rathbone, 5 Hill 143, Sec. 68.
 vs. Reynolds, 7 Pet. 113, Sec. 18, 60, 65, 68, 99.
 Dover vs. Twombly, 42 N. H. 59, Sec. 153.
 Dowell vs. Richardson, 10 Ind. 573, Sec. 209.
 Downer vs. Chesebrough, 36 Conn. 39, Sec. 47.
 Dowling vs. Polack, 18 Cal. 625, Sec. 193.
 Dowbiggen vs. Bourne, 2 Young & Collier 462, Sec. 249.
 Downer vs. Baxter, 30 Vt. 467, Sec. 283.
 Dows vs. Swett, 120 Mass. 332, Sec. 42.
 Downey vs. O'Donnell, 86 Ill. 49, Sec. 135.
 Doyle vs. Nesting, 37 Col. 522, Sec. 61.
 Drake vs. Scaman, 97 N. Y. 234, Sec. 27.
 vs. Smythe, 44 Iowa 410, Sec. 186.
 Draper vs. Weld, 13 Gray 580, Sec. 114.
 vs. Wood, 112 Mass. 315, Sec. 74.
 Draughan vs. Bunting, 9 Ired. (N. C.) 10, Sec. 34, 74.
 vs. State, 35 Tex. Cr. Rep. 51, Sec. 231.
 Drew vs. Lockett, 32 Beav. 499, Sec. 250.
 Drinkwine vs. City of Eau Claire, 83 Wis. 428, Sec. 181.
 Drolesbaugh vs. Hill, 64 O. S. 257, Sec. 164.
 Drumheller vs. Amer. Sur. Co., 30 Wash. 530, Sec. 76a.
 Drummond vs. Prestman, 12 Wheat. 515, Sec. 16, 50.
 Drury vs. Young, 58 Md. 546, Sec. 30.
 Dry vs. Davy, 10 Ad. & Ell. 30, Sec. 52.
 Dubois vs. Mason, 127 Mass. 37, Sec. 8.
 Dudley vs. Buckley, 68 W. Va. 630, Sec. 248.
 Duffy vs. Wunsch, 42 N. Y. 243, Sec. 38.
 Dugan vs. Champion Coal Co., 105 Ky. 821, Sec. 22.
 vs. Commonwealth, 69 Ky. 305, Sec. 228.
 Dugger vs. Wright, 51 Ark. 232, Sec. 219, 263.
 Duker vs. Franz, 7 Bush (Ky.) 273, Sec. 73.
 Dun vs. Garrett, 93 Tenn. 650, Sec. 109.
 Dunn vs. Parsons, 40 Hun 77, Sec. 98.
 vs. Slee, Holt N. P. 399, Sec. 88.

(References are to sections.)

- Dunn vs. Sparks, 1 Ind. 397, Sec. 277.
 Dunlap vs. Eden, 15 Ind. App. 575, Sec. 125.
 vs. Foster, 7 Ala. 734, Sec. 263.
 vs. Willett, 153 N. C. 317, Sec. 23.
 Duncan vs. North & South Wales Bank, 6 Appeal Cases 1, Sec. 244.
 Dung vs. Parker, 52 N. Y. 496, Sec. 25.
 Dunterman vs. Storey, 40 Neb. 447, Sec. 190.
 Dupee vs. Blake, 148 Ill. 453, Sec. 92.
 Durbin vs. Kuney, 19 Ore. 71, Sec. 269.
 Durein vs. State, 38 Kan. 485, Sec. 231.
 Durnherr vs. Rau, 135 N. Y. 219, Sec. 131.
 Durham vs. Craig, 79 Ind. 117, Sec. 255.
 Dussol vs. Bruguere, 50 Cal. 456, Sec. 275.
 Dustin vs. Hodgen, 47 Ill. 125, Sec. 50.
 Dwelley vs. Dwelley, 143 Mass. 509, Sec. 128.
 Dwenger vs. Geary, 113 Ind. 106, Sec. 128.
 Dye vs. Dye, 21 O. S. 86, Sec. 95.
 Dyer vs. Gibson, 10 Wis. 557, Sec. 42.

E

- Earle vs. Earle, 49 N. Y. Super. Ct. 57, Sec. 181.
 East Bridgewater Sav. Bank vs. Bates, 191 Mass. 110, Sec. 68.
 Easter vs. White, 12 O. S. 219, Sec. 34.
 Easterly vs. Barber, 66 N. Y. 433, Sec. 278.
 Eastern Railroad Co. vs. Loring, 138 Mass. 381, Sec. 132.
 Eastman vs. Curtis, 4 Vt. 616, Sec. 147.
 vs. Foster, 8 Met. 19, Sec. 255.
 Eastwood vs. Kenyon, 11 Ad. & Ell. 438, Sec. 31.
 Eaton vs. Littlefield, 147 Mass. 122, Sec. 138.
 vs. Mayo, 118 Mass. 141, Sec. 58.
 vs. Waite, 49 N. Y. 57, Sec. 181.
 Eberhardt vs. Wood, 2 Tenn. Ch. 488, Sec. 277.
 Ecker vs. Bohn, 45 Md. 278, Sec. 45.
 Eddy vs. Davidson, 42 Vt. 56, Sec. 37.
 vs. Moore, 23 Kan. 113, Sec. 201.
 vs. Sturgeon, 15 Mo. 199, Sec. 96.
 Edgerly vs. Emerson, 23 N. H. 555, Sec. 249.
 vs. Lawson, 176 Mass. 551, Sec. 51.
 Edmonds vs. Sheahan, 47 Tex. 443, Sec. 271.
 Edmonson vs. Potts' Admr., 111 Va. 79, Sec. 115.
 Edmonston vs. Drake, 5 Pet. 624, Sec. 65.
 Edmunds vs. Harper, 31 Gratt. (Va.) 637, Sec. 117.
 Edwards vs. Bodine, 11 Paige 223, Sec. 197.
 vs. Coleman, 6 T. B. Mon. (Ky) 567, Sec. 81, 94.
 vs. Edwards, 31 Ill. 474, Sec. 196.
 vs. Pomeroy, 8 Cal. 254, Sec. 201.
 vs. United States, 103 U. S. 471, Sec. 145.

(References are to sections.)

- Edwards Co. vs. Goldstein, 80 O. S. 303, Sec. 202.
 Egbert vs. Hanson, 70 N. Y. S. 383, Sec. 273.
 Egremont vs. Benjamin, 125 Mass. 15, Sec. 160.
 Eilbert vs. Finkbeiner, 68 Pa. St. 243, Sec. 8, 10.
 Einstein vs. Marshall, 58 Ala. 153, Sec. 58.
 Elder vs. Kutner, 97 Cal. 490, Sec. 200, 204.
 Electric Appliance Co. vs. U. S. Fidelity & Guar. Co., 110 Wis. 434, Sec. 125, 131, 243.
 Elizalde vs. Murphy, 163 Cal. 681, Sec. 218, 222.
 Elkin vs. People, 4 Ill. 207, Sec. 157.
 Ellicott vs. Warford, 4 Md. 85, Sec. 227.
 Ellesmere Brewing Co. vs. Cooper, 1 Q. B. L. R. 75, Sec. 263.
 Ellis vs. Felt, 206 Mass. 472, Sec. 38.
 vs. Johnson, 83 Wis. 394, Sec. 217.
 vs. Jones, 70 Miss. 60, Sec. 66.
 vs. Wilmot, L. R. 10 Ex. 10, Sec. 100.
 Ellis, et al., vs. Johnson, 96 Ind. 383, Sec. 23.
 Ellison vs. Wischart, 29 Ind. 32, Sec. 38.
 Elliott vs. Black, 45 Mo. 372, Sec. 212.
 vs. Brady, 192 N. Y. 221, Sec. 117.
 vs. Giese, 7 Harr. & J. 457, Sec. 27.
 vs. Jenness, 111 Mass. 29, Sec. 45.
 Ellsworth vs. Harmon, 101 Ill. 274, Sec. 51.
 Ellwell vs. Seattle Scandinavian Fish Co., 2 Alaska 617, Sec. 202.
 Ellwood Mfg. Co. vs. Rankin, 70 Iowa 403, Sec. 197.
 Ellyson vs. Lord, 124 Iowa 125, Sec. 137.
 Elrod vs. Gastineau, 124 Ky. 609, Sec. 274.
 Emerine vs. O'Brien, 36 O. S. 491, Sec. 97.
 Emerson vs. Slater, 22 How. (U. S.) 28, Sec. 39.
 Emerson Mfg. Co. vs. Rustad, 120 N. W. 1094, Sec. 66.
 Emery vs. Baltz, 94 N. Y. 408, Sec. 71.
 vs. Burbank, 163 Mass. 326, Sec. 47.
 Emmitt vs. Brophy, 42 O. S. 82, Sec. 142.
 Empire State Surety Co. vs. Carroll County, 194 Fed. 593, Sec. 23a, 122, 149.
 vs. Lindenmeier, 54 Colo. 497, Sec. 70.
 Engler vs. People's Fire Ins. Co., 46 Md. 322, Sec. 123, 130.
 English vs. Darley, 2 Bos. & Pul. 61, Sec. 100.
 vs. Landon, 181 Ill. 614, Sec. 83.
 vs. Siebert, 49 Mo. App. 563, Sec. 114.
 Ennis vs. Waller, 3 Black. (Ind.) 472, Sec. 22.
 Enos vs. Anderson, 40 Colo. 395, Sec. 31.
 Enright vs. Falvey, L. R. 4 Ir. 397, Sec. 107.
 Ensley vs. Hollingsworth, 170 Ala. 396, Sec. 45.
 Enterprise Hotel Co. vs. Book, 48 Oreg. 58, Sec. 76a.
 Epenbaugh vs. Gooch, 15 Ky. L. Rep. 576, Sec. 196.
 Equitable Surety Co. vs. Hazen, 121 Ark. 630, Sec. 76a.
 vs. U. S., 234 U. S. 448, Sec. 131.
 Erfurth vs. Stevenson, 71 Ark. 199, Sec. 76a.
 Erie Co. Sav. Bank vs. Coit, 104 N. Y. 532, Sec. 57.
 Ernst Bros. vs. Hogue, 86 Ala. 502, Sec. 213.

(References are to sections.)

- Erwin vs. Downs, 15 N. Y. 575, Sec. 104.
 Esbleman vs. Bolenius, 114 Pa. 269, Sec. 268.
 Estate of Ramsey vs. Whitbeck, 183 Ill. 550, Sec. 16, 138.
 Estey vs. Harmon, 40 Mich. 645, Sec. 213.
 Ettlinger vs. National Surety Co., 221 N. Y. 467, Sec. 15.
 Eureka Stone Co. vs. First Christian Church, 86 Ark. 212, Sec. 76b, 82.
 Evans vs. Bell, 45 Tex. 553, Sec. 62.
 vs. Brembridge, 8 DeG. M. & G. 100, Sec. 111.
 vs. Comm, 8 Watts (Pa.) 398, Sec. 177.
 vs. Daughtry, 84 Ala. 68, Sec. 109.
 vs. Graden, 125 Mo. 72, Sec. 73, 79.
 vs. Hoare, L. R. 1 Q. B. 593, Sec. 30.
 vs. Illinois Surety Co., 298 Ill. 101, Sec. 119.
 vs. Hoare, L. R. 1 Q. B. 593, Sec. 30.
 vs. Keeland, 9 Ala. 42, Sec. 15, 105.
 vs. Lawton, 34 Fed. Rep. 233, Sec. 76.
 vs. McCormick, 167 Pa. 247, Sec. 66.
 vs. Populus, 2 La. Ann. 121, Sec. 145.
 vs. State Bank, 13 Ala. 787, Sec. 174.
 vs. Taylor, 60 Tex. 422, Sec. 217.
 Evansville Nat. Bank vs. Kaufman, 93 N. Y. 273, Sec. 52.
 Evarts vs. Steger, 6 Ore. 55, Sec. 121.
 Everson vs. Gere, 122 N. Y. 290, Sec. 51.
 Ewan vs. Brooks, Waterfield Co., 55 O. S. 596, Sec. 8, 10.
 Excelsior Needle Co. vs. Smith, 61 Conn. 56, Sec. 49.
 Exchange Bank vs. McDill, 56 S. C. 565, Sec. 96.
 vs. McMillan, 76 S. C. 561, Sec. 96.
 Executors of White, 30 Vt. 338, Sec. 279.
 Expanded Metal Co. vs. Bradford, 177 Fed. 604, Sec. 188.
 Ex Parte Banks, 185 Ala. 275, Sec. 46.
 Bishop, 15 Ch. Div. 400, Sec. 271.
 Garland, 4 Wall. 333, Sec. 145.
 Gifford, 6 Ves. 805, Sec. 102, 114.
 Harris, 52 Ala. 87, Sec. 148.
 Henderson, 6 Fla. 279, Sec. 180.
 Jacobs, L. R. 10 Ch. 211, Sec. 100.
 Kerwin, 8 Cow. 118, Sec. 20.
 Smith, 3 Bro. C. C. 1, Sec. 102.
 Snowden, In re, 17 Ch. Div. 44, Sec. 269.
 Waring, et al., 2 Glyn & Jameson 404, Sec. 256.
 Yates, 2 DeG. & J. 191, Sec. 75.
 Eyre vs. Hollier, Lloyd & Gould 250, Sec. 73.
 Eyster's Appeal, 4 Harris 372, Sec. 166.
 Ezzard vs. Bell, 100 Ga. 150, Sec. 249.

F

- Fahnestock vs. Gilham, 77 Ill. 637, Sec. 211.
 Fahnestock's Appeal, 104 Pa. 46, Sec. 166.
 Fain vs. Turner, 96 Ky. 634, Sec. 42.
 Fair vs. Pengelly, 34 Up. Can. (Q. B.) 611, Sec. 82.
 Faires vs. Cockerell, 88 Tex. 428, Sec. 276.
 vs. Lodanc, 10 Ala. 50, Sec. 36.

(References are to sections.)

- Fairchild vs. Hodges, 14 Wash. 117, Sec. 166.
 vs. Keith, 29 O. S. 156, Sec. 169.
 vs. Northeastern Mutl. Life Assn., 51 Vt. 613, Sec. 142.
- Falconer vs. Shores, 37 Ark. 386, Sec. 150.
- Fales vs. McDonald, 32 R. I. 406, Sec. 275.
- Fall River Nat. Bank vs. Slade, 153 Mass. 415, Sec. 118.
- Fambro vs. Keith, 122 S. W. 40, Sec. 83.
- Famulener vs. Anderson, 15 O. S. 473, Sec. 20, 109.
- Fanning vs. Murphy, 126 Wis. 538, Sec. 81, 83, 90.
- Farebrother vs. Simmons, 5 Bar. & Ald. 333, Sec. 22.
 vs. Wodehouse, 23 Beav. 18, Sec. 250.
- Farmers Bank vs. Braden, 145 Pa. 473, Sec. 106.
 vs. Hunt, 124 N. C. 171, Sec. 23a.
 vs. Reynolds, 13 O. 85, Sec. 99.
 vs. Teeters, 31 O. S. 36, Sec. 274.
- Farmers Loan & Trust Co. vs. Lord, 41 Okl. 569, Sec. 185.
- Farmers & Traders Bank vs. Fidelity & Dep. Co., 22 Ky. L. Rep. 22, Sec. 248
 vs. Harrison, 57 Mo. 503, Sec. 83.
- Farmington vs. Hobart, 74 Me. 416, Sec. 142.
 vs. Stanley, 60 Me. 472, Sec. 106, 162.
- Farrar vs. Kramer, 5 Mo. App. 187, Sec. 76.
- Farris vs. Mathews, 149 Ky. 455, Sec. 203.
- Farrow vs. Respess, 11 Ired. Law (N. C.) 170, Sec. 61, 67.
- Farwell vs. Smith, 12 Pick. 83, Sec. 69.
- Fassbender vs. Amer. Sur. Co., 122 N. Y. S. 442, Sec. 220.
- Fassnacht vs. Emsing Gagen Co., 18 Ind. App. 80, Sec. 106.
- Faulkner vs. Faulkner, 73 Mo. 327, Sec. 132.
- Faurot vs. Gates, 86 Wis. 569, Sec. 273.
- Fawcett vs. Freshwater, 31 O. S. 637, Sec. 83.
- Fawcetts vs. Kimmey, 33 Ala. 261, Sec. 247.
- Fawkner vs. Baden, 89 Ind. 587, Sec. 210.
- Fay vs. Edmiston, 25 Kan. 439, Sec. 176.
 vs. Richardson, 7 Pick. 91, Sec. 123.
 vs. Tower, 58 Wis. 286, Sec. 94.
- Feamster vs. Withrow, 12 W. Va. 611, Sec. 282.
- Fearons vs. Wright, 6 Ky. L. Rep. 747, Sec. 184.
- Featherstone vs. Hendrick, 59 Ill. App. 497, Sec. 57.
- Federal Union Surety Co. vs. Maguire, 111 Ark. 373, Sec. 233.
- Feemster vs. Anderson, 6 T. B. Mon. (Ky.) 537, Sec. 185.
- Fegley vs. Jennings, 44 Fla. 203, Sec. 61.
- Fehlinger vs. Wood, 134 Pa. 517, Sec. 40.
- Feigert vs. State, 31 O. S. 432, Sec. 163, 172.
- Felton vs. Bissell, 25 Minn. 15, Sec. 280.
- Fennell vs. McGowan, 58 Miss. 261, Sec. 99.
 vs. McGuire, 21 Up. Can. (C. P.) 134, Sec. 59, 71.
- Fenter vs. Obaugh, 17 Ark. 71, Sec. 105.
- Fergus Falls vs. Illinois Surety Co., 112 Minn. 462, Sec. 76a.
- Ferguson vs. Glidwell, 48 Ark. 195, Sec. 202.
 vs. Kinnoull, 9 Cl. & Fin. 251, Sec. 169. .
 vs. Turner, 7 Mo. 497, Sec. 99.

(References are to sections.)

- Ferrell vs. Maxwell, 28 O. S. 383, Sec. 34, 265.
 vs. Millican, 156 S. W. 230, Sec. 32.
 Ferrer vs. Barrett, 4 Jones Eq. (N. C.) 455, Sec. 270.
 Ferry vs. Burchards, 21 Conn. 597, Sec. 149.
 Fertig vs. Bucher, 3 Pa. 308, Sec. 111.
 Fessenden vs. Summers, 62 Cal. 486, Sec. 8, 10.
 Fetrow vs. Wiseman, 40 Ind. 148, Sec. 11.
 Fewlass vs. Keesban, 88 Fed. Rep. 573, Sec. 71, 119.
 Fidelity Mutnal Life Ins. Assn. vs. Dewey, 83 Minn. 389, Sec. 76, 107.
 Fidelity & Casualty Co. vs. Crays, 76 Minn. 450, Sec. 242.
 vs. Eichhoff, 63 Minn. 170, Sec. 242.
 vs. Gate City Nat. Bank, 97 Ga. 634, Sec. 240.
 vs. Lawler, 64 Minn. 144, Sec. 34.
 Fidelity & Deposit Co. vs. Agnew, 152 Fed. 955, Sec. 76b.
 vs. Aultman, 58 Fla. 228, Sec. 144.
 vs. Buckley, 75 N. H. 506, Sec. 279.
 vs. Butler, 130 Ga. 225, Sec. 243a.
 vs. Colvin & Jackson, 83 Mo. App. 204, Sec. 135.
 vs. Commonwealth, 104 Ky. 579, Sec. 155.
 vs. Moahier, 151 Fed. 806, Sec. 106.
 vs. Phillips, 84 Atl. 432, Sec. 263.
 vs. Robertson, 136 Ala. 379, Sec. 76a, 76b.
 vs. Singer, 50 Atl. Rep. 518, Sec. 243.
 vs. Sonsley, 151 S. W. 353, Sec. 249.
 Fidelity & Guaranty Co. vs. Western Bank, 29 Ky. L. R. 639, Sec. 240.
 Fidler vs. Hershey, 90 Pa. 363, Sec. 116.
 Field vs. Holland, 6 Cranch 8, Sec. 118.
 Fielding vs. Waterhouse, 8 Jones & Spen. 424, Sec. 98.
 Files vs. Reynolds, 66 Ark. 314, Sec. 143.
 Finch vs. State, 71 Tex. 52, Sec. 158.
 Findlay vs. Hosmer, 2 Conn. 350, Sec. 252.
 Findley vs. Hill, 8 Ore. 247, Sec. 84.
 Finnell vs. Jas. H. Goodman Co. Bank, 156 Cal. 18, Sec. 245.
 Finney vs. Condon, 86 Ill. 80, Sec. 76b.
 Finnucan vs. Feigenspan, 81 Conn. 378, Sec. 49, 60.
 Fiola vs. Ainsworth, 63 Neb. 1, Sec. 123.
 Fire Assn. of Phila. vs. Ruby, 49 Neb. 584, Sec. 176.
 Fire, etc., Assurance Co. vs. Thompson, 68 Cal. 208, Sec. 106.
 Fireman's Ins. Co. vs. Wilkinson, 35 N. J. Eq. 160, Sec. 86.
 Firman vs. Flood, 2 Kans. 496, Sec. 8.
 First Commercial Bank vs. Valentine, 209 N. Y. 145, Sec. 215.
 First Congregation Church of Christ in Corona vs. Lowery, 175 Cal. 124,
 Sec. 238.
 First Mass. Turnpike Co. vs. Feld, 3 Mass. 201, Sec. 141.
 First M. E. Church vs. Isenberg, 246 Pa. St. 221, Sec. 131.
 First Nat. Bank vs. Babcock, 94 Cal. 96, Sec. 67.
 vs. Carpenter, 41 Iowa 518, Sec. 65.
 vs. Chalmers, 144 N. Y. 432, Sec. 43.
 vs. Cheney, 114 Ala. 536, Sec. 90.
 vs. Fidelity & Dep. Co., 145 Ala. 335, Sec. 76b.
 vs. Finck, 100 Wis. 446, Sec. 23.

(References are to sections.)

- First Nat. Bank vs. Fiske, 133 Pa. 241, Sec. 49.
 vs. Gaines, 87 Ky. 597, Sec. 112.
 vs. Homesly, 99 N. C. 531, Sec. 115.
 vs. Houtzer, 96 O. S. 404, Sec. 49, 50.
 vs. Johnson, 133 Mich. 700, Sec. 15.
 vs. Kittle, 69 W. Va. 171, Sec. 99.
 vs. Lineberger, 86 N. C. 454, Sec. 82.
 vs. Marshall, 73 Me. 79, Sec. 10.
 vs. Mattingly, 92 Ky. 650, Sec. 15.
 vs. Payne, 111 Mo. 291, Sec. 8.
 vs. Powell, 149 S. W. 1096, Sec. 99, 101.
 vs. Rogers, 13 Minn. 407, Sec. 387.
 vs. Samuelson, 82 Neb. 532, Sec. 129.
 vs. Schreiner, 110 Pa. 188, Sec. 101.
 vs. Taylor, 38 Utah 516, Sec. 15.
 vs. Wheeler, 12 Tex. Civ. App. 489, Sec. 255.
 vs. Wood, 71 N. Y. 405, Sec. 116.
- First Presbyterian Church vs. Housel, 116 Ill. App. 230, Sec. 76b.
- First State Bank vs. Stevens Land Co., 119 Minn. 209, Sec. 181, 186.
- Fish vs. Glover, 154 Ill. 86, Sec. 115.
- Fishback vs. Weaver, 34 Ark. 569, Sec. 253.
- Fishburn vs. Jones, 37 Ind. 119, Sec. 105, 127.
- Fisher vs. Columbia Bldg. & Loan Assn., 59 Mo. App. 430, Sec. 245.
 vs. Spillman, 85 Kan. 552, Sec. 90.
- Fisk & Co. vs. Rickel, 108 Iowa 370, Sec. 48.
- Fitcher vs. Griffiths, 103 N. E. 471, Sec. 251.
- Fitzgerald vs. Staples, 88 Ill. 234, Sec. 20, 121.
- Fitzgerald Spear Co. vs. Kelly, 81 N. J. L. 6, Sec. 36.
- Fitzpatrick vs. Todd, 79 Ky. 524, Sec. 188.
- Fitzpatrick's Admr. vs. Hill, 9 Ala. 783, Sec. 254.
- Fixel vs. Tallman, 116 N. Y. S. 639, Sec. 208.
- Flannagan vs. Cleveland, 44 Neb. 58, Sec. 184, 186, 190.
- Flannigan vs. Erwin, 173 Ill. App. 452, Sec. 212.
- Fleming vs. Barden, 126 N. C. 450, Sec. 83.
 vs. Odum, 59 Ga. 362, Sec. 100.
- Flenham vs. Steward, 45 Neb. 640, Sec. 67.
- Fletcher vs. Austin, 11 Vt. 447, Sec. 74.
 vs. Menken, 37 Ark. 206, Sec. 254.
- Flournoy vs. Jeffersonville, 17 Ind. 169, Sec. 169.
- Floyd vs. Anderson, 5 Okl. Cr. 65, Sec. 200.
 vs. Hamilton, 33 Ala. 235, Sec. 208.
- Foerderer vs. Moors, 91 F. 476, Sec. 98.
- Fogel vs. Dussault, 147 Mass. 154, Sec. 181.
- Fogg Co. vs. Bartlett, 75 Atl. 380, Sec. 82.
- Follansbee vs. Johnson, 28 Minn. 311, Sec. 142.
- Folsom vs. Carli, 5 Minn. 333, Sec. 249.
- Folz vs. Tradesman's Trust & Sav. Fund Co., 201 Pa. 583, Sec. 70.
- Fond-du-Lac Harrow Co. vs. Bowles, 54 Wis. 425, Sec. 76.
 vs. Haskins, 51 Wis. 135, Sec. 69.

(References are to sections.)

- Foo Long vs. American Surety Co., 146 N. Y. 251, Sec. 186.
 Forburger Stone Co. vs. Lion Bonding Surety Co., 103 Neb. 202, Sec. 131.
 Forbes vs. Jackson, 19 Ch. D. 615, Sec. 244, 250.
 vs. Keyes, 193 Mass. 38, Sec. 222.
 vs. McHugh, 152 Mass. 412, Sec. 217.
 Ford vs. Beard, 31 Mo. 459, Sec. 82.
 vs. Beech, 11 Q. B. 852, Sec. 93.
 vs. Loomis, 62 Iowa, 586, Sec. 197.
 vs. McLain, 164 Mo. App. 174, Sec. 16.
 Foreman vs. People, 209 Ill. 567, Sec. 145.
 Forest County vs. United Surety Co., 149 Wis. 323, Sec. 164.
 Forniquet vs. Tegarden, 24 Miss. 96, Sec. 139.
 Forst vs. Leonard, 112 Ala. 296, Sec. 125.
 Fosmire vs. National Surety Co., 229 N. Y. 44 Sec. 131.
 vs. Ryan, 104 Mich. 625, Sec. 110.
 Foster vs. Barney, 3 Vt. 60, Sec. 68.
 vs. Clark, 19 Pick. 329, Sec. 139.
 vs. Commonwealth, 35 Pa. 148, Sec. 222.
 vs. Davis, 46 Mo. 268, Sec. 166.
 vs. Epps, 27 Ill. App. 235, Sec. 185.
 vs. Hooper, 2 Mass. 572, Sec. 119.
 vs. Metts, 55 Miss. 77, Sec. 170.
 vs. Trustees of Athenaeum, 3 Ala. 302, Sec. 249.
 Foster, Admx., vs. Wise, Admr., 46 O. S. 20, Sec. 218.
 Fountain vs. Bigham, 235 Pa. 35, Sec. 14.
 Fourth Nat. Bank vs. Mayer, 96 Ga. 728, Sec. 208.
 vs. Spinney, 47 Hun 293, Sec. 126, 132.
 Fowler vs. Alexander, 1 Heisk. (Tenn.) 425, Sec. 112.
 vs. Allen, 32 S. C. 229, Sec. 74.
 vs. Brooks, 13 N. H. 240, Sec. 94.
 vs. Gordon, 5 Ky. L. Rep. 332, Sec. 187.
 Fowler Nat. Bank vs. Brown, 19 Ind. App. 433, Sec. 58.
 Frahm vs. Walton, 130 Cal. 396, Sec. 193.
 Frank vs. Edwards, 8 Welsb. H. & G. 214, Sec. 132.
 Frankel vs. Stern, 44 Cal. 168, Sec. 208.
 Franklin Ave. Sav. Institute vs. Board of Education, 75 Mo. 408, Sec. 128.
 Franklin Bank vs. Cooper, 36 Me. 179, Sec. 15, 127.
 vs. Stevens, 39 Me. 532, Sec. 15, 106.
 Fransioli vs. Thompson, 55 Wash. 259, Sec. 76a.
 Fraser vs. Little, 13 Mich. 195, Sec. 214.
 Fray vs. Blackburn, 3 Best & Sm. 576, Sec. 168.
 Frazer vs. Jordan, 8 El. & Bl. 303, Sec. 93.
 Freaner vs. Yingling, 37 Md. 491, Sec. 98.
 Fredericks vs. Board of Health of Hoboken, 82 N. J. L. 200, Sec. 145.
 Freeholders vs. Wilson, 16 N. J. L. 110, Sec. 156.
 Freeland vs. Compton, 30 Miss. 424, Sec. 84.
 Freeman vs. Davis, 7 Mass. 200, Sec. 210.
 Frelinghuysen vs. Baldwin, 16 Fed. Rep. 452, Sec. 107.
 French vs. Bates, 149 Mass. 73, Sec. 70.
 vs. Hicks, 52 Tex. Civ. App. 427, Sec. 23a.
 vs. Marsh, 29 Wis. 649, Sec. 63.
 vs. Ryan, 104 Mich. 625, Sec. 110.
 Frew vs. Scouler, 101 Neb. 131, Sec. 273.

(References are to sections.)

- Friberg vs. Donovan, 23 Ill. App. 58, Sec. 246, 263.
 Friedlander vs. N. Y. Plate Glass Co., 56 N. Y. S. 583, Sec. 52.
 Friedline vs. State, 93 Ind. 366, Sec. 231.
 Friedman vs. Lemle, 38 La. Ann. 654, Sec. 188.
 Friend vs. Smith Gin Co., 59 Ark. 86, Sec. 93.
 Friendly vs. Elwert, 57 Ore. 509, Sec. 28.
 vs. National Surety Co., 46 Wash. 71, Sec. 78.
 Frink vs. Peabody, 26 Ill. App. 390, Sec. 274.
 vs. Southern Express Co., 82 Ga. 33, Sec. 130, 137.
 Frohardt Bros. vs. Duff, 156 Iowa 144, Sec. 39.
 Froude vs. Bishop, 49 N. Y. S. 955, Sec. 83.
 Frost vs. Jord, 37 Minn. 544, Sec. 208.
 vs. Standard Metal Co., 215 Ill. 240, Sec. 60, 66.
 Frownfelter vs. State, 60 Md. 80, Sec. 156.
 Fry vs. Bannon Sewer Pipe Co., 101 N. E. 10, Sec. 75.
 Fulkerson vs. Brownlee, 69 Mo. 371, Sec. 248.
 Fullam vs. Adams, 37 Vt. 391, Sec. 40.
 Fuller vs. Aylesworth, 75 Fed. Rep. 604, Sec. 187.
 vs. Davis, 1 Gray 612, Sec. 104, 232.
 vs. Dupont, 183 Mass. 596, Sec. 109.
 vs. Hapgood, 39 Vt. 617, Sec. 253, 274.
 vs. Scott, 3 Kan. 25, Sec. 16, 67.
 vs. Tomlinson, 58 Iowa 111, Sec. 99.
 Fullerton vs. Hill, 48 Kan. 558, Sec. 8, 10, 112.
 vs. Sturges, 4 O. S. 529, Sec. 109.
 Fullerton Lumber Co. vs. Gates, 89 Mo. App. 201, Sec. 76a.
 vs. Snouffer, 139 Iowa 176, Sec. 8.
 Furness vs. Read, 63 Md. 1, Sec. 202.
 Furnold vs. Bank, 44 Mo. 336, Sec. 249.
 Fusz vs. Trager, 39 La. Ann. 292, Sec. 205.

G

- Gadsden vs. Brown, Speer's Eq. (S. C.) 37, Sec. 259.
 Gaff vs. Sims, 45 Ind. 262, Sec. 68.
 Gage vs. Lewis, 68 Ill. 604, Sec. 110, 281.
 vs. Mechanic's Nat. Bank, 79 Ill. 62, Sec. 61.
 Galbraith vs. Fullerton, 53 Ill. 126, Sec. 83.
 Gallagher vs. Brunel, 6 Cowen 346, Sec. 110.
 Gallagher vs. McBride, 66 N. J. L. 360, Sec. 36.
 Gamage vs. Hutchins, 23 Me. 565, Sec. 66, 67.
 Gamble-Robinson Co. vs. Mass. Bonding & Ins. Co., 113 Minn. 38, Sec. 235.
 Gammell vs. Parramore, 58 Ga. 54, Sec. 70.
 Gandy vs. Gandy, L. R. 30 Ch. Div. 57, Sec. 142.
 Ganey vs. Hohlman, 145 Ill. App. 467, Sec. 79.
 Gannett vs. Blodgett, 39 N. H. 150, Sec. 245.
 Gans vs. Carter & Aiken, 77 Md. 1, Sec. 13.
 vs. Thieme, 93 N. Y. 225, Sec. 259, 271.
 Gard vs. Stevens, 12 Mich. 292, Sec. 18, 59, 96.

(References are to sections.)

- Gardner vs. Brown, 22 Nev. 156, Sec. 214.
 vs. Cooper, 9 Kan. App. 587, Sec. 122.
 vs. Walsh, 5 El. & Bl. 83, Sec. 75.
 vs. Watson, 76 Tex. 25, Sec. 50, 73.
- Gardener vs. Woodyear, 1 Ohio 170, 177, Sec. 181.
- Garland vs. Gaines, 73 Conn. 602, Sec. 57, 61.
- Garlin vs. Strickland, 27 Me. 443, Sec. 209.
- Garlinghouse vs. Jacobs, 29 N. Y. 297, Sec. 172.
- Garner vs. Hudgins, 46 Mo. 399, Sec. 34, 39, 279.
- Garnett vs. Farmers' Nat. Bank, 91 Ky. 614, Sec. 132.
- Garrett vs. Logan, 19 Ala. 344, Sec. 197.
 vs. Shove, 15 R. I. 538, Sec. 121.
- Garver vs. Tisinger, 46 O. S. 56, Sec. 227.
- Garvin vs. Garvin, 27 S. C. 472, Sec. 249.
- Gaskill vs. Wales, 36 N. J. Eq. 527, Sec. 244.
- Gasquet vs. Oakey, 19 La. 76, Sec. 284.
- Gatchell vs. Morse, 81 Me. 205, Sec. 128.
- Gates vs. Bell, 3 La. Ann. 62, Sec. 22.
 vs. McKee, 13 N. Y. 232, Sec. 18, 50, 60.
 vs. Tebbetts, 83 Neh. 573, Sec. 11a, 104.
- Gausson vs. United States, 97 U. S. 584, Sec. 152.
- Gay vs. Grant, 101 N. C. 206, Sec. 218.
 vs. Mott, 43 Ga. 252, Sec. 16.
 vs. Murphy, 134 Mo. 98, Sec. 123.
 vs. Parpart, 101 U. S. 391, Sec. 181.
 vs. Schaefer, 52 Wash. 269, Sec. 43.
 vs. Ward, 67 Conn. 147, Sec. 71, 119.
- Gaylor vs. Hunt, 23 O. S. 255, Sec. 169.
- George vs. Andrews, 60 Md. 26, Sec. 90.
 vs. Bischoff, 68 Ill. 236, Sec. 188.
 vs. Crim, 66 S. E. 526, Sec. 249.
 vs. Elms, 46 Ark. 260, Sec. 221.
 vs. Hoskins, 30 S. W. Rep. (Ky.) 406, Sec. 34.
- Gerard vs. Cowperthwait, 21 N. Y. S. 1092, Sec. 135.
- Gerber vs. Ackley, 32 Wis. 233, Sec. 164.
 vs. Sharp, 72 Ind. 553, Sec. 249.
- German Amer. Sav. Bank vs. Fritz, 68 Wis. 390, Sec. 249, 253.
- German American Bank vs. Auth, 87 Pa. 419, Sec. 130.
- German National Bank vs. Foreman, 138 Pa. 474, Sec. 101.
- German Savings Inst. vs. Vahle, 28 Ill. App. 557, Sec. 86.
- Germania Fire Ins. Co. vs. Hawks, 55 Ga. 674, Sec. 143.
 vs. Lange, 193 Mass. 67, Sec. 76.
- Getty vs. Binsse, 49 N. Y. 385, Sec. 69, 119.
- Ghiselin vs. Ferguson, 4 Har. & J. (Md.) 522, Sec. 248.
- Gibbens vs. Pickett, 31 Fla. 147, Sec. 147.
- Gibbs vs. Blanchard, 15 Mich. 292, Sec. 37.
 vs. Johnson, 63 Mich. 671, Sec. 109, 199.
- Gibson vs. Mitchell, 16 Fla. 519, Sec. 273.
 vs. Rix, 32 Vt. 824, Sec. 140.
 vs. Shelan, 5 App. D. C. 391, Sec. 263.

(References are to sections.)

- Gieseke vs. Johnson, 115 Ind. 308, Sec. 284.
 Gifford vs. Rising, 12 N. Y. Supp. 430, Sec. 249.
 Gilbert vs. Neely, 35 Ark. 24, Sec. 248.
 Giles vs. Brown, Admr., 60 Ga. 658, Sec. 220.
 Gilkey vs. Cook, 60 Wis. 133, Sec. 147.
 Gill vs. Morris, 11 Heisk. 614, Sec. 103.
 Gillespie vs. Torrance, 25 N. Y. 306, Sec. 117.
 Gillett vs. Wiley, 126 Ill. 310, Sec. 225.
 Gillighan vs. Boardman, 29 Me. 79, Sec. 27.
 Gillilan vs. Ludington, 6 W. Va. 128, Sec. 115.
 Gilmore vs. Crowell, 67 Barb. 62, Sec. 206.
 Gilpin vs. Hord, 85 Ky. 213, Sec. 185, 188.
 vs. Marley, 4 Houst. (Del.) 284, Sec. 8, 10.
 Gingrich vs. People, 34 Ill. 448, Sec. 232.
 Glasgow vs. State, 41 Kan. 333, Sec. 232.
 Glass vs. Thompson, 9 B. Mon. (Ky.) 235, Sec. 97.
 Glasscock vs. Hamilton, 62 Tex. 143, Sec. 114, 269, 275.
 Glazier vs. Douglass, 32 Conn. 393, Sec. 101.
 Gleason vs. Briggs, 28 Vt. 135, Sec. 36.
 Gleeson's Estate, 192 Pa. 279, Sec. 183, 188.
 Glencoe vs. People, 78 Ill. 382, Sec. 147.
 Glenn vs. Jones, 146 Cal. 518, Sec. 76b.
 vs. Morgan, 23 W. Va. 467, Sec. 83.
 Globe Bank vs. Sniall, 25 Me. 366, Sec. 67.
 Godfrey vs. Crisler, 121 Ind. 203, Sec. 97.
 vs. Rice, 59 Me. 308, Sec. 275, 284.
 Godwin vs. Francis, L. R. 5, C. P. 295, Sec. 30.
 Goebel vs. Stevenson, 35 Mich. 172, Sec. 205.
 Goetz vs. Foos, 14 Minn. 265, Sec. 31.
 Goff vs. Bankston, 35 Miss. 518, Sec. 11.
 Gold vs. Bailey, 44 Ill. 491, Sec. 234.
 Goldring vs. Thompson, 58 Fla. 248, Sec. 58.
 Golsen vs. Brand, 75 Ill. 148, Sec. 275, 280.
 Good vs. Martin, 95 U. S. 90, Sec. 8, 10, 12.
 vs. Martin, 1 Colo. 165, Sec. 10.
 Goodall vs. Wentworth, 20 Me. 322, Sec. 269.
 Goodbar vs. Lindsley, 51 Ark. 380, Sec. 208.
 Goodling vs. Simon, 54 Pa. Sup. Ct. 125, Sec. 39.
 Goodman vs. Chase, 1 Barn. & Ald. 297, Sec. 38.
 Good Roads Machinery Co. vs. Moore, 25 Ind. App. 479, Sec. 76.
 Goodrich vs. Tracy, 43 Vt. 314, Sec. 97.
 Goodwin vs. Blake, 3 T. B. Mon. (Ky.) 106, Sec. 138.
 Goodwine vs. State, 81 Ind. 109, Sec. 156.
 Goodwyn vs. Hightower, 30 Ga. 249, Sec. 82.
 Goodyear Dental Vulcanite Co. vs. Bacon, 151 Mass. 460, Sec. 23a, 122.
 Gordon vs. Moore, 44 Ark. 349, Sec. 114.
 vs. Price, 10 Ired. 385, Sec. 35.
 vs. Rixley, 86 Va. 853, Sec. 269.

(References are to sections.)

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 Gosserand vs. Lacour, 8 La. Ann. 75, Sec. 88, 114.
 Gossin vs. Brown, 11 Pa. 527, Sec. 250.
 Gottfried Brewing Co. vs. McDonald, 146 Ill. App. 601, Sec. 144.
 Gould vs. Ellery, 39 Barb. 163, Sec. 51.
 vs. Robson, 8 East. 576, Sec. 96.
 vs. Steyer, 75 Ind. 50, Sec. 220.
 Goux vs. Moucla, 30 La. Ann. 743, Sec. 223.
 Governor vs. Chuteau, 1 Mo. 771, Sec. 220.
 vs. Dodd, 81 Ill. 162, Sec. 159.
 vs. Gordan, 15 Ala. 72, Sec. 145.
 vs. Lagow, 43 Ill. 134, Sec. 151.
 vs. Montfort, 23 N. C. 155, Sec. 175.
 vs. Pearce, 31 Ala. 465, Sec. 164.
 Grace vs. Mitchell, 31 Wis. 533, Sec. 172.
 Gradle vs. Hoffman, 105 Ill. 147, Sec. 147.
 Graeff's Appeal, 79 Pa. St. 146, Sec. 252.
 Graff vs. Foster, 67 Mo. 512, Sec. 46.
 Graff & Co.'s Estate, 139 Pa. 69, Sec. 245.
 Grafton vs. Cummings, 99 U. S. 100, Sec. 29.
 Graham vs. Bradley, 5 Humph. (Tenn.) 476, Sec. 63.
 vs. Marks, 98 Ga. 67, Sec. 14, 103.
 vs. Middleby, 185 Mass. 349, Sec. 68.
 vs. Ringo, 67 Mo. 324, Sec. 117.
 vs. Rush, 73 Iowa 451, Sec. 75.
 vs. State, 66 Ind. 386, Sec. 146.
 Granite Bldg. Co. vs. Saville, 101 Va. 217, Sec. 233, 241.
 Grant vs. Ludlow, 8 O. S. 1, Sec. 255.
 vs. Naylor, 4 Cranch 224, Sec. 52.
 vs. Shaw, 16 Mass. 341, Sec. 42.
 vs. Smith, 46 N. Y. 93, Sec. 76.
 Graves vs. Lebanon Nat. Bank, 10 Bush (Ky.) 23, Sec. 15, 106, 141.
 vs. Sittig, 5 Wis. 219, Sec. 209.
 Graves, et al., vs. Tucker, 10 Smedes & M. 9, Sec. 15, 127.
 Gray vs. Farmers Bank, 81 Md. 631, Sec. 115.
 vs. Herman, 75 Wis. 453, Sec. 41.
 vs. Mathias, 5 Ves. Jr. 286, Sec. 138.
 vs. Robinson, 33 Pac. Rep. (Ariz.) 712, Sec. 214.
 vs. Seckham, L. R. 7 Ch. App. 680, Sec. 252.
 vs. South & North Ala. R. R., 162 Ala. 262, Sec. 193.
 vs. State, 43 Ala. 4, Sec. 231.
 vs. The State, 78 Ind. 68, Sec. 19.
 Great Falls vs. Hanks, 21 Mont. 83, Sec. 151.
 Great Western Ptg. Co. vs. Belcher, 127 Mo. App. 133, Sec. 61.
 Greely vs. Dow, 2 Met. 176, Sec. 93.
 Green vs. Blunt, 59 Iowa 79, Ark. 229, Sec. 98.
 vs. Boyd, 13 Pa. Sup. Ct. 651, Sec. 76.
 vs. Brookins, 23 Mich. 48, Sec. 32.

(References are to sections.)

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 vs. Conrad, 114 Mo. 651, Sec. 144.
 vs. Cresswell, 10 Ad. & Ell. 453, Sec. 32, 33.
 vs. Hadfield, 89 Wis. 138, Sec. 43.
 vs. Milbank, 56 How. Pr. 32, Sec. 275.
 vs. Richardson, 4 Colo. 584, Sec. 43.
 vs. Solomon, 80 Mich. 234, Sec. 38.
 vs. Young, 8 Me. 14, Sec. 71.
 Greenberg vs. People, 225 Ill. 174, Sec. 164.
 Green Bay & Minn. R. R. Co. vs. Union Steamship Co., 107 U. S. 98, Sec. 11.
 Greene vs. Burton, 59 Vt. 423, Sec. 39.
 Greene County vs. Wilhite, 29 Mo. App. 459, Sec. 20, 109.
 Green Fruit Co. vs. Pate, 99 Ga. 60, Sec. 208.
 Greenfield vs. Wilson, 13 Gray 384, Sec. 164.
 Greenius vs. American Surety Co., 92 Wash. 401, Sec. 164.
 Greenlaw vs. Pettit, 87 Tenn. 467, Sec. 251.
 Greenough vs. Smead, 3 O. S. 415, Sec. 8, 9, 112.
 Greenville vs. Ormand, 51 S. C. 58, Sec. 78.
 Greenwood vs. Taylor, 1 Russ. & M. 185, Sec. 252.
 Greer Machine Co. vs. Sears, 23 Ky. Law. Rep. 2025, Sec. 66.
 Gregory vs. Logan, 7 Blackf. (Ind.) 112, Sec. 27.
 vs. O'Brian, 13 N. J. L. 11, Sec. 184.
 Grey vs. Friar, 15 Q. B. 907, Sec. 135.
 Grider vs. Tally, 77 Ala. 422, Sec. 169.
 Gridley vs. Capen, 72 Ill. 11, Sec. 48, 70.
 Grieff vs. Kirk, 17 La. Ann. 25, Sec. 185.
 Griffin vs. Hasty, 94 N. C. 438, Sec. 139.
 vs. Levee Comrs., 71 Miss. 767, Sec. 166.
 vs. Long, 131 S. W. 672, Sec. 280.
 vs. Rembert, 2 Rich. N. S. (S. C.) 410, Sec. 51.
 Griffith vs. First Nat. Bank, 79 N. E. 230, Sec. 255.
 Griffith vs. Robertson, 15 Hun 344, Sec. 99.
 vs. Rundle, 23 Wash. 453, Sec. 131.
 vs. Sitgreaves, 90 Pa. St. 161, Sec. 14.
 Griffiths vs. Hardenbergh, 41 N. Y. 464, Sec. 139.
 Grim vs. Jackson Tp., 51 Pa. 219, Sec. 109.
 Grimmer vs. Henderson, 66 Ala. 521, Sec. 221.
 Gring's Appeal, 89 Pa. 336, Sec. 261.
 Grisard vs. Hinson, 50 Ark. 229, Sec. 99.
 Grissom vs. Commercial Bank, 87 Tenn. 350, Sec. 257.
 Gritman vs. U. S. Fidelity & Guar. Co., 41 Wash. 77, Sec. 109.
 Grob vs. Gross, 83 N. J. L. 430, Sec. 60.
 Grocers Bank vs. Kingman, 16 Gray 473, Sec. 80, 132.
 Groendyke vs. Musgrave, 123 Iowa 535, Sec. 76.
 Grommes vs. St. Paul Trust Co., 147 Ill. 634, Sec. 286.
 Gronna vs. Goldammer, 26 N. D. 122, Sec. 275.
 Gross vs. Bouton, 9 Daly (N. Y.) 25, Sec. 181.
 vs. Davis, 87 Tenn. 226, Sec. 271, 272, 283.
 Grove vs. Johnstone, L. R., 24 Ir. 352, Sec. 104.
 vs. Van Duyn, 44 N. J. L. 654, Sec. 168.
 Groyer Co. vs. Jones, 79 Miss. 253, Sec. 287.
 Grubbs vs. Wysors, 32 Gratt. 127, Sec. 250.

(References are to sections.)

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 Guarantee Co. of N. A. vs. Mechanic's Sav. Bank & Trust Co., 183 U. S. 402, Sec. 233, 240.
 Guaranty Co. vs. Pressed Brick Co., 191 U. S. 416, Sec. 18, 76a, 81, 233, 238.
 Guardian Fire Assurance Co. vs. Thompson, 68 Cal. 208, Sec. 15.
 Guardian Trust Co. vs. Peabody, 107 N. Y. S. 515, Sec. 50.
 Guckenheimer & Bros. Co. vs. Kann, 89 Atl. 807, Sec. 275.
 Gudtner vs. Kilpatrick, 14 Neb. 347, Sec. 190.
 Guggenheim vs. Rosenfeld, 68 Tenn. 533, Sec. 44.
 Guild vs. Butler, 127 Mass. 386, Sec. 90, 98, 100.
 vs. Conrad, L. R. 1894, 2 Q. B. Div. 885, Sec. 265.
 vs. Thomas, 54 Ala. 414, Sec. 127.
 Gunn vs. Geary, 44 Mich. 615, Sec. 17.
 Gunnis vs. Cluff, 111 Pa. 512, Sec. 203.
 vs. Weigley, 114 Pa. 191, Sec. 103.
 Gumz vs. Geigling, 108 Mich. 295, Sec. 10.
 Gustine vs. Union Bank, 10 Rob. (La.) 412, Sec. 92.
 Gutschenritter vs. Whitmore, 158 Iowa 252, Sec. 158.
 Guthrie vs. Carpenter, 162 Ind. 417, Sec. 76b.
 vs. Fisher, 2 Idaho 111, Sec. 205.
 vs. Ray, 36 Neb. 612, Sec. 244.
 Guthrie Daily Leader vs. Cameron, 3 Okl. 677, Sec. 145.
 Guynn vs. McCauley, 32 Ark. 97, Sec. 46.
 Gwynne vs. Burnell, 7 Cl. & Fin. 572, Sec. 156.

H

- Haberer vs. Hansen, 148 Ill. App. 83, Sec. 185.
 Hacker vs. Johnson, 66 Me. 21, Sec. 215.
 Hacker's Appeal, 121 Pa. 192, Sec. 122.
 Hackett vs. First Nat. Bank, 114 Ky. 193, Sec. 74.
 Haddock, Blanchard & Co. vs. Haddock, 192 N. Y. 499, Sec. 8.
 Haden vs. Brown, 18 Ala. 641, Sec. 116.
 Hager vs. Catlin, 18 Hun 448, Sec. 147.
 Hagerthy vs. Phillips, 83 Me. 336, Sec. 278.
 Hagey vs. Hill, 75 Pa. 108, Sec. 92.
 Hagler vs. State, 31 Neb. 144, Sec. 123.
 Hahn vs. Maxwell, 33 Ill. App. 261, Sec. 41.
 Haigh vs. Brooks, 10 Ad. & Ell. 309, Sec. 50.
 Haigler vs. Adams, 5 Ga. App. 637, Sec. 76a.
 Halbert vs. State, 22 Ind. 125, Sec. 167.
 Halderman vs. Woodward, 22 Kas. 734, Sec. 95.
 Hall vs. Auburn Co., 27 Cal. 255, Sec. 148.
 Hall vs. Equitable Surety Co., 126 Ark. 535, Sec. 32.
 vs. First Nat. Bank, 5 Kan. App. 493, Sec. 85.
 vs. Gleason, 158 Ky. 789, Sec. 269.
 vs. Hall, 10 Humph. (Tenn.) 352, Sec. 280.
 vs. Hoxie, 84 Ill. 16, Sec. 98.
 vs. Monroe, 73 Me. 123, Sec. 210.
 vs. Presnell, 157 N. C. 290, Sec. 82.
 vs. Rand, 8 Conn. 560, Sec. 50.
 H. & S. Engineering Co. vs. Turney, 101 Texas, 63, Sec. 233.

(References are to sections.)

- Hall vs. State, 69 Miss. 529, Sec. 149.
 vs. Tierney, 89 Minn. 407, Sec. 164.
 vs. Weaver, 34 Fed. 104, Sec. 6.
 vs. Wisconsin, 103 U. S. 5, Sec. 145.
 Hall's Admx. vs. McHenry, 19 Iowa 521, Sec. 75.
 Hall's Extr. vs. Farmers Bank, 23 Ky. Law Rep. 1450, Sec. 66.
 Halliday vs. Hart, 30 N. Y. 474, Sec. 82.
 Hallock vs. Yankey, 102 Wis. 41, Sec. 88, 94, 114.
 Halsa vs. Halsa, 8 Mo. 303, Sec. 27.
 Halsey vs. Flint, 15 Abb. Pr. (N. Y.) 367, Sec. 182.
 vs. Murray, 112 Ala. 185, Sec. 275.
 Ham vs. Greve, 34 Ind. 18, Sec. 15, 105, 106.
 Hamm vs. Fagan, 36 Okl. 223, Sec. 72.
 Hamil vs. Hall, 4 Colo. App. 290, Sec. 40.
 Hamilton vs. Hooper, 46 Iowa 515, Sec. 75.
 vs. Johnston, 82 Ill. 39, Sec. 264.
 vs. Prouty, 50 Wis. 592, Sec. 84.
 vs. State, 32 Md. 348, Sec. 194.
 vs. Watson, 12 Clark & Fin. 109, Sec. 106.
 Hammond vs. Hannin, 21 Mich. 374, Sec. 22.
 vs. Myers, 30 Tex. 375, Sec. 261.
 Hampe vs. Manke, 28 S. D. 501, Sec. 90.
 Hampton vs. Phipps, 108 U. S. 260, Sec. 255.
 Hanby's Adm. vs. Henritze's Admr., 85 Va. 177, Sec. 246.
 Hancock vs. Council, 96 Ga. 778, Sec. 44.
 vs. Fleming, 103 Ind. 533, Sec. 244.
 vs. Hazzard, 12 Cush. 112, Sec. 167.
 Hand Mfg. Co. vs. Marks, 36 Oreg. 523, Sec. 76b, 96.
 Handley vs. Heflin, 84 Ala. 600, Sec. 273.
 Handy vs. Burrton Land Co., 59 Kan. 395, Sec. 183.
 Haney vs. People, 12 Colo. 345, Sec. 14.
 Hangsleben vs. People, 89 Ill. 164, Sec. 231.
 Hanish vs. Kennedy, 106 Mich. 455, Sec. 264.
 Hann vs. Lloyd, 50 N. J. L. 1, Sec. 172.
 Hanna vs. International Petroleum Co., 23 O. S. 622, Sec. 215.
 vs. McKenzie, 5 B. Mon. 314, Sec. 195.
 Hannibal & St. J. R. R. Co. vs. Shepley, 1 Mo. App. 254, Sec. 197.
 Hansen vs. Rounsavell, 74 Ill. 238, Sec. 96.
 Hansford vs. Perin, 6 B. Mon. (Ky.) 595, Sec. 203.
 Hanson vs. Manley, 7 Iowa 48, Sec. 118.
 vs. Svarvernd, 18 N. D. 550, Sec. 45.
 Harbaugh vs. Albertson, 102 Ind. 69, Sec. 19.
 Harbert vs. Dumont, 3 Ind. 346, Sec. 93.
 vs. Gormley, 115 Pa. 237, Sec. 203.
 Harbord vs. Cooper, 43 Minn. 466, Sec. 51.
 Hardell vs. Carroll, 90 Wis. 350, Sec. 275.
 Hardester vs. Tate, 85 Mo. App. 624, Sec. 89.
 Hardesty vs. Price, 3 Col. 556, Sec. 139.

(References are to sections.)

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 Hardin's Admr. vs. Taylor, 78 Ky. 593, Sec. 225.
 Harding vs. Kuessner, 172 Ill. 125, Sec. 185.
 vs. Tift, 75 N. Y. 461, Sec. 96.
 vs. Waters, 6 Lea 324, Sec. 10.
 Hardman vs. Bradley, 85 Ill. 162, Sec. 36.
 Hardwick vs. Wright, 35 Beav. 133, Sec. 98.
 Hardy vs. Bern, 5 T. R. 540, Sec. 135.
 vs. Pool, 41 N. C. 28, Sec. 58.
 vs. United States, 71 Fed. Rep. 158, Sec. 231.
 Hardy Buggy Co. vs. Paducah Banking Co., 183 Ky. 776, Sec. 287.
 Hare vs. Grant, 77 N. C. 203, Sec. 286.
 Harger vs. Spofford, 46 Iowa 11, Sec. 203.
 Hargis vs. Mayes, 20 Ky. L. Rep. 1965, Sec. 189.
 Hargreave vs. Smee, 6 Bing. 244, Sec. 18, 59.
 Hargreaves vs. Parsons, 13 Mees. & Wels. 561, Sec. 31.
 Hargroves vs. Cooke, 15 Ga. 321, Sec. 27.
 Harless vs. Consumers' Gas Trust Co., 14 Ind. App. 545, Sec. 192.
 Harley vs. Stapleton's Adm., 24 Mo. 248, Sec. 284.
 Harman vs. Howe, 27 Gratt. 676, Sec. 194.
 Harmony Nat. Bank's Appeal, 101 Pa. 428, Sec. 255.
 Harms vs. McCormick, 30 Ill. App. 125, Sec. 142.
 Hassell vs. Long, 2 M. & S. 363, Sec. 2.
 Harner vs. Batdorf, 35 O. S. 143, Sec. 97.
 vs. Dipple, 31 O. S. 72, Sec. 11.
 Harper vs. Kemble, 65 Mo. App. 514, Sec. 247.
 vs. McVeigh, 82 Va. 751, Sec. 280.
 vs. National Life Insurance Co., 56 Fed. 281, Sec. 76.
 vs. Rosenberger, 56 Mo. App. 388, Sec. 249.
 Harrah vs. Doherty, 117 Mich. 175, Sec. 278.
 Harrington's Admr. vs. Crawford, 61 Mo. App. 221, Sec. 139.
 Harris vs. Brooks, 21 Pick. 195, Sec. 113, 267.
 vs. Frank, 29 Kan. 200, Sec. 247, 249.
 vs. Harris, 23 Gratt. 737, Sec. 122.
 vs. Harrison, 78 N. C. 202, Sec. 248.
 vs. Jones, 23 N. D. 488, Sec. 278.
 vs. Lee, 1 P. Wms. 482, Sec. 259.
 vs. Newell, 42 Wis. 687, Sec. 6, 115, 281.
 vs. Regester, 70 Md. 109, Sec. 23a.
 vs. Rivers, 53 Ind. 216, Sec. 258.
 vs. State, 60 Ark. 212, Sec. 228, 231.
 vs. Warner, 13 Wend. 400, Sec. 264.
 vs. Young, 40 Ga. 65, Sec. 33.
 Harrisburg Sav. & Loan Assn. vs. U. S. Fid. & Guar. Co., 197 Pa. 177, Sec. 132.
 Harrison vs. Birrell, 58 Ore. 410, Sec. 36.
 vs. Clark, 87 N. Y. 572, Sec. 221.
 vs. Hoff, 102 N. C. 25, Sec. 181.
 vs. Lumbermen's Ins. Co., 8 Mo. App. 37, Sec. 127.
 vs. Price, 25 Gratt. 553, Sec. 115.

(References are to sections.)

- Harrison vs. Sawtell, 10 Johns. 242, Sec. 39.
 vs. Union Pacific Ry. Co., 13 Fed. Rep. 522, Sec. 11.
 vs. Wilkin, 69 N. Y. 412, Sec. 19.
- Harshman vs. Armstrong, 43 Ind. 126, Sec. 278.
- Harshaw vs. McDowell, 89 N. C. 181, Sec. 181.
- Hart vs. Clouser, 30 Ind. 210, Sec. 72.
 vs. Mayor of Newark, 80 N. J. L. 600.
 vs. Minchen, 69 Fed. Rep. 520, Sec. 65.
 vs. United States, 95 U. S. 316, Sec. 162.
 vs. Western R. R., 13 Met. 99, Sec. 248.
- Hartford Fire Ins. Co. vs. Casey, 196 Mo. App. 291, Sec. 76. 107.
- Hartman vs. Danner, 74 Pa. 36, Sec. 83.
- Hartley vs. Colquitt, 72 Ga. 351, Sec. 232.
 vs. Sanford, 55 L. R., A. (N. J. Ct. of Error & App.) 206, Sec. 34.
- Harts vs. Wendell, 26 Ill. App. 274, Sec. 214.
- Hartwell vs. Smith, 15 O. S. 200, Sec. 254.
 vs. Whitman, 36 Ala. 712, Sec. 253.
- Harwood vs. Kiersted, 20 Ill. 367, Sec. 55.
- Hatch vs. Attleborough, 97 Mass. 533, Sec. 150, 174.
 vs. Douglas, 48 Conn. 116, Sec. 128.
 vs. Elkins, 65 N. Y. 489, Sec. 174.
- Hatchett vs. Pegram, 21 La. Ann. 722, Sec. 275, 284.
- Hatfield vs. Merod, 82 Ill. 113, Sec. 265, 280.
- Hathaway vs. Davis, 33 Cal. 161, Sec. 190.
- Hauenstein vs. Gillespie, 73 Miss. 742, Sec. 134.
- Hauer & McNaix vs. Patterson, 84 Pa. 274, Sec. 10.
- Haughton vs. Bayley, 31 N. C. 337, Sec. 143.
- Havens vs. Lathene, 75 N. C. 505, Sec. 166.
 vs. Willis, 100 N. Y. 482, Sec. 244.
- Hawes vs. Armstrong, 1 Bing. N. C. 761, Sec. 26.
 vs. Marchant, 1 Curt. 136, Sec. 14.
- Hawkins vs. Bail's Adm., 18 B. Mon. 630, Sec. 69.
 vs. Chace, 19 Pick. 502, Sec. 22, 30.
 vs. New Orleans Ptg. & Pub. Co., 29 La. Ann. 134, Sec. 54.
- Hawley vs. Gray Bros. Paving Co., 127 Cal. 560, Sec. 187.
- Haworth vs. Crosby, 120 Iowa 612, Sec. 105.
- Hayden vs. Cabot, 17 Mass. 169, Sec. 233.
 vs. Cook, 34 Neb. 670, Sec. 76a, 134.
 vs. Keith, 32 Minn. 277, Sec. 192.
 vs. Thrasher, 18 Fla. 795, Sec. 281.
- Haydenville Bank vs. Parsons, 138 Mass. 53, Sec. 83.
- Hayer vs. Comstock, 115 Iowa 187, Sec. 287.
- Hayes vs. Chicago Gravel Co., 37 Ill. App. 19, Sec. 195.
 vs. Joseph, 26 Cal. 535, Sec. 96.
 vs. Ward, 4 Johns. Ch. 123, Sec. 244.
 vs. Wells, 34 Md. 512, Sec. 82, 84.
- Hayman vs. Hallam, 79 Ky. 389, Sec. 208.
- Hays vs. Wilstach, 101 Ind. 100, Sec. 188.
- Hazard vs. Griswold, 21 Fed. Rep. 178, Sec. 14, 103.
- Hazelrigg vs. Donaldson, 59 Ky. 445, Sec. 202.

(References are to sections.)

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Headington vs. Neff, 7 O. 229, Sec. 45.
Healdsburg vs. Mulligan, 113 Cal. 205, Sec. 167.
Healy vs. Newton, 96 Mich. 228, Sec. 190.
Heard vs. Tappan, 121 Ga. 437, Sec. 74.
Heath vs. Hunter, 72 Me. 259, Sec. 185.
 vs. Lent, 1 Cal. 410, Sec. 208.
 vs. Shrempp, 22 La. Ann. 167, Sec. 176.
Heaton vs. Eldridge & Higgins, 56 O. S. 87, Sec. 47.
Hebert vs. Lee, 118 Tenn. 133, Sec. 107.
Hecht vs. Skaggs, 53 Ark. 291, Sec. 273.
 vs. Weaver, 34 Fed. 111, Sec. 119.
Hecker vs. Mahler, 64 O. S. 308, Sec. 279.
Hedden vs. Schneblin, 126 Mo. App. 478, Sec. 31, 57.
Hedrick vs. Robbins, 30 Ind. App. 595, Sec. 76a.
Heeringa vs. Ortlepp, 167 Ill. App. 586, Sec. 60, 68.
Hees vs. Nellis, 65 Barb. 440, Sec. 143.
Heffield vs. Meadows, 4 C. P. Div. 595, Sec. 59.
Heidt vs. Minor, 89 Cal. 115, Sec. 171.
Heims Brewing Co., vs. Flannery, 137 Ill. 309, Sec. 11.
Heinlen vs. Beans, 71 Cal. 295, Sec. 185.
Heise vs. Bumpass, 40 Ark. 545, Sec. 10.
Held vs. Bagwell, 58 Iowa 139, Sec. 21.
Helena vs. Brule, 15 Mont. 429, Sec. 107.
Helt vs. Whittier, 31 O. S. 475, Sec. 185.
Hellams vs. Abererombie, 15 S. C. 110, Sec. 279.
Helm's Admr. vs. Young, 9 B. Mon. (Ky.) 394, Sec. 255.
Helmkamp vs. Wood, 85 Mo. App. 227, Sec. 197.
Hemmingway vs. Poucher, 98 N. Y. 281, Sec. 183.
Henderson vs. Ardery, 36 Pa. 449, Sec. 81.
 vs. Huey, 45 Ala. 275, Sec. 98.
 vs. Marvin, 31 Barb. 297, Sec. 76.
Henkleman vs. Peterson, 154 Ill. 419, Sec. 17.
Henry vs. Ankrum, 39 Law Bul. (O.) 78, Sec. 131.
 vs. Sneed, 99 Mo. 407, Sec. 19.
Henry County vs. Salmon, 201 Mo. 136, Sec. 134.
Hendry vs. Cartwright, 89 Pac. 309, Sec. 109, 123.
Hendryx vs. Evans, 120 Iowa 310, Sec. 99.
Henrie vs. Buck, 39 Kan. 381, Sec. 17.
Hennessy vs. Metzger, 152 Ill. 505, Sec. 135.
Henricus vs. Englert, 137 N. Y. 488, Sec. 142.
Henly vs. Mayor of Lyme, 5 Bing. 91 Sec. 145.
 vs. Stemmons, 4 B. Mon. (Ky.) 131, Sec. 263.
Hentig vs. Collins, 1 Kan. App. 173, Sec. 183.
Hendrick vs. Whittemore, 105 Mas. 23, Sec. 267.
Hepe vs. Johnson, 73 Cal. 265, Sec. 144.
Herrick vs. Borst, 4 Hill 650, Sec. 116.
 vs. Swartwout, 72 Ill. 340, Sec. 187.
Herman vs. Jeuchner, 15 Q. B. Div. 561, Sec. 279.
Hershizer vs. Florence, 39 Ohio St. 516, Sec. 11.
Hertz vs. Kaufman, 46 Ill. App. 591, Sec. 215.

(References are to sections.)

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Hess' Estate, 150 Pa. 346, Sec. 122.
69 Pa. 272, Sec. 245.
Hessell vs. Johnson, 63 Mich. 623, Sec. 72, 74, 109, 127.
Hessey vs. Heitkamp, 9 Mo. App. 36, Sec. 182.
Hester vs. State, 15 Tex. App. 418, Sec. 231.
Hetfield vs. Dow, 27 N. J. L. 440, Sec. 37.
Hetten vs. Lane, 43 Tex. 279, Sec. 156.
Hevener vs. Berry, 17 W. Va. 474, Sec. 249.
Heyman vs. Dooley, 77 Md. 162, Sec. 57, 67.
vs. Landers, 12 Cal. 107, Sec. 196.
Hibbard vs. McKindley, 28 Ill. 240, Sec. 196.
Hibernia Sav. Bank vs. McGinnis, 9 Mo. App. 578, Sec. 76.
Hibbs vs. Blair, 14 Pa. 413, Sec. 199.
Hiehorn vs. Fletcher, 66 Me. 209, Sec. 275.
Hicks vs. Mendenhall, 17 Minn. 475, Sec. 211.
Hicklin vs. Nebraska, etc., Bank, 8 Neb. 463, Sec. 210.
Hickcock vs. Bell, 46 Tex. 610, Sec. 187.
Hidden vs. Bishop, 5 R. I. 29, Sec. 118.
Higdon vs. Fields, 6 Ala. App. 281, Sec. 146.
Higgins vs. J. I. Case Threshing Machine Co., 95 Neb. 3, Sec. 188.
vs. Mansfield, 62 Ala. 267, Sec. 208.
Hightower vs. Moore, 46 Ala. 387, Sec. 119.
Hileman & Gint vs. Faus, 178 Iowa 644, Sec. 76a.
Hill vs. American Surety Co., 200 U. S. 197, 201, Sec. 131.
vs. Burke, 62 N. Y. 111, Sec. 161.
vs. Haynes, 54 N. Y. 153, Sec. 172.
vs. King, 48 O. S. 75, Sec. 249.
vs. Morse, 61 Me. 541, Sec. 276.
vs. O'Neill, 101 Ga. 832, Sec. 74.
vs. Scales, 15 Tenn. 410, Sec. 122.
vs. Thomas, 19 S. C. 230, Sec. 196.
Hill Mercantile Co. vs. Rotan Grocery Co., 127 S. W. 1080, Sec. 50, 66.
Hiller vs. Daman, 183 Mo. App. 315, Sec. 25.
vs. Howell, 74 Ga. 174, Sec. 96.
Hilliboe vs. Warner, 17 N. D. 594, Sec. 75, 114.
Hilton vs. Dinsmore, 21 Me. 410, Sec. 40.
Himrod vs. Baugh, 85 Ill. 435, Sec. 117.
Himrod Furnace Co. vs. Cleveland & Mahoning R. R. Co., 22 O. S. 451,
Sec. 28.
Hine vs. Morse, 218 U. S. 493, Sec. 19.
Hiner vs. Newton, 30 Wis. 640, Sec. 117, 258.
Hindman vs. Langford, 3 Strob. 207, Sec. 40.
Hinchman vs. Rutan, 31 N. J. L. 496, Sec. 45.
Hinkle vs. Holmes, 85 Ind. 405, Sec. 188.
Hinkley vs. Kreitz, 58 N. Y. 583, Sec. 189, 246, 249.
Hinkson vs. Com., 14 Ky. L. Rep. 203, Sec. 231.
Hinton vs. Stanton, 165 S. W. 299, Sec. 76-a.
Hippach vs. McKeever, 166 Ill. 136, Sec. 57.
Hirsch vs. Chicago Carpet Co., 82 Ill. App. 234, Sec. 57.

(References are to sections.)

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- Hoagland vs. Segur, 38 N. J. L. 230, Sec. 137.
- Hobbs vs. Barefoot, 104 N. C. 224, Sec. 164.
- Hobson vs. Hall, 14 S. W. (Ky.) 958, Sec. 205.
vs. Trevor, 2 P. Wms. 191, Sec. 135.
- Hobson, In re, 61 Hun 504, Sec. 218.
- Hoboken vs. Gear, 27 N. J. L. 265, Sec. 145.
vs. Harrison, 30 N. J. L. 73, Sec. 146.
- Hocker vs. Gentry, 60 Ky. 463, Sec. 46.
- Hodgins vs. Heaney, 15 Minn. 185, Sec. 41.
- Hodgkins vs. Jackson, 70 Ky. 342, Sec. 43.
- Hodgson vs. Baldwin, 65 Ill. 532, Sec. 269.
vs. Dexter, 1 Cranch C. C. 109, Sec. 161.
vs. Hodgson, 2 Keen 704, Sec. 114.
vs. Shaw, 3 Myl. & K. 183, Sec. 244, 249.
- Hodges vs. State, 20 Tex. 493, Sec. 231.
- Hoey vs. Jarman, 39 N. J. L. 523, Sec. 50.
- Hoffman vs. Bechtel, 52 Pa. 190, Sec. 63.
vs. Mayand, 93 Fed. 171, Sec. 57.
- Hoffman, Admx. vs. Fleming, 66 O. S. 143, Sec. 222.
- Hoge vs. Norton, 22 Kan. 374, Sec. 208, 222.
vs. Trigg, 4 Munf. (Va.) 150, Sec. 147.
vs. Vintroux, 21 W. Va. 1, Sec. 222.
- Hogue vs. State, 28 Ind. App. 285, Sec. 106, 155.
- Hoggatt vs. Thomas, 35 La. Ann. 298, Sec. 265.
- Hohn vs. Shideler, 164 Ind. 242, Sec. 76-a.
- Holandsworth vs. Commonwealth, 11 Bush. (Ky.) 617, Sec. 12.
- Hollingsworth vs. Atkins, 46 La. Ann. 515, Sec. 203.
vs. Tanner, 44 Ga. 11, Sec. 101, 257.
- Hollingshead vs. McKenize, 8 Ga. 457, Sec. 46.
- Holler vs. Richards, 102 N. C. 545, Sec. 46.
- Holland vs. Johnson, 51 Ind. 346, Sec. 98.
vs. Teed, 7 Hare 50, Sec. 54.
- Holm vs. Jamieson, 173 Ill. 295, Sec. 6, 11, 104.
- Holme vs. Brunskill, 3 Q. B. Div. 495, Sec. 79.
- Holmes vs. Day, 108 Mass. 563, Sec. 246.
vs. Preston, 71 Miss. 541, Sec. 67.
vs. Standard Oil Co., 183 Ill. 70, Sec. 137.
vs. Steamer Bell Air, 5 La. Ann. 523, Sec. 185.
- Holcomb vs. Foxworth, 34 Miss. 265, Sec. 198.
vs. Sawyer, 51 Cal. 417, Sec. 181.
- Holcombe vs. Fetter, 70 N. J. 300, Sec. 281.
- Holt vs. Bodey, 18 Pa. 207, Sec. 98.
vs. Green, 23 P. F. Smith 198, Sec. 138.
- Holliday vs. Brown, 33 Neb. 657, Sec. 99.
vs. Cohen, 34 Ark. 707, Sec. 208.
- Hollister vs. Davis, 54 Pa. 508, Sec. 117, 258.
- Holliman vs. Carroll, 27 Tex. 23, Sec. 164.

(References are to sections.)

- Holbrook vs. Investment Co., 32 Ore. 104, Sec. 187.
 Holloway vs. Holloway, 103 Mo. 274, Sec. 196.
 Holthaus vs. Hart, 9 Mo. App. 1, Sec. 197.
 Holthouse vs. State, 49 Ind. App. 178, Sec. 72, 75.
 Holthausen vs. Kells, 45 N. Y. S. 471, Sec. 119.
 Holtham vs. Ryland, 1 Eq. Cases Abr. 18 Pl. 8, Sec. 135.
 Hollinsbee vs. Ritchey, 49 Ind. 261, Sec. 184.
 Homans vs. Lambard, 21 Me. 308, Sec. 36.
 Home Bank vs. Newton, 8 Ill. App. 563, Sec. 101.
 vs. Waterman, 134 Ill. 461, Sec. 90.
 Home Ins. Co. vs. Holway, 55 Iowa 571, Sec. 15, 106, 145.
 Home Savings Bank vs. Bierstadt, 168 Ill. 618, Sec. 260.
 vs. Hosie, 119 Mich. 116, Sec. 49.
 Homer vs. Ashford, 3 Bing. 322, Sec. 138.
 Hood vs. Hayward, 124 N. Y. 1, Sec. 114, 220.
 vs. Mathis, 21 Mo. 308, Sec. 195.
 vs. Morgan, 47 W. Va. 817, Sec. 276.
 Hook vs. Richeson, 115 Ill. 431, Sec. 280.
 Hooks vs. Branch Bank, 8 Ala. 580, Sec. 95, 284.
 Hooker vs. Blount, 44 Tex. Civ. App. 162, Sec. 97.
 Hooper vs. Hooper, 32 W. Va. 526, Sec. 43.
 vs. Hooper, 81 Md. 155, Sec. 50, 275.
 vs. Patterson, 32 Pac. Rep. (Cal.) 514, Sec. 197.
 Hoover vs. McCormick, 84 Wis. 215, Sec. 67.
 vs. Mowrer, 84 Iowa 43, Sec. 274.
 Hopkins vs. Orr, 124 U. S. 510, Sec. 185.
 Hoppes vs. Hoppes, 123 Ind. 397, Sec. 281.
 Hormel & Co. vs. Amer. Bonding Co., 112 Minn. 288, Sec. 76-a, 233, 235.
 Horn vs. Bray, 51 Ind. 555, Sec. 265.
 Horton vs. Manning, 37 Tex. 23, Sec. 10.
 Hornback vs. Swope, 8 Ky. L. Rep. 533, Sec. 195.
 Hosmer vs. True, 19 Barb. 106, Sec. 135.
 Hotchkiss vs. Barnes, 34 Conn. 27, Sec. 59.
 vs. Platt, 8 Hun 46, Sec. 196.
 Hotbam vs. Berry, 82 Kan. 412, Sec. 275.
 Hough vs. Aetna Life Ins. Co., 57 Ill. 318, Sec. 1.
 Houghton vs. Meyer, 208 U. S. 149, Sec. 195.
 vs. Milburn, 54 Wis. 554, Sec. 142.
 vs. Pattee, 58 N. H. 326, Sec. 135.
 Houck vs. Graham, 106 Ind. 195, Sec. 275.
 House vs. Schnadig, 235 Ill. 301, Sec. 100.
 vs. Surety Co., 21 Tex. Civ. App. 590, Sec. 76-a.
 Hover vs. Barkhoof, 44 N. Y. 113, Sec. 172.
 Howe vs. Buffalo, N. Y. & Erie R. R. Co., 37 N. Y. 297, Sec. 282.
 vs. Frazer, 2 Rob. (La.) 424, Sec. 246.
 vs. Watson, 179 Mass. 30, Sec. 28.
 Howe Co. vs. Farrington, 82 N. Y. 121, Sec. 15, 99, 113, 128.
 Howell vs. Alma, 36 Neb. 80, Sec. 186.
 vs. Harvey, 65 W. Va. 310, Sec. 39.
 vs. Parsons, 89 N. C. 230, Sec. 20, 121.

(References are to sections.)

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 vs. Lindeberg, 2 Alaska 301, Sec. 193.
 vs. Wyatt, 145 Ky. 424, Sec. 212.
- Howard Ins. Co. vs. Silverberg, 89 Fed. Rep. 168, Sec. 189.
- Howland vs. White, 48 Ill. App. 236, Sec. 248.
- Howley vs. Scott, 123 Minn. 159, Sec. 158.
- Hoxie vs. National Bank, 20 Tex. Civ. App. 462, Sec. 276.
- Hoyle vs. Hoyle, L. R. (1893), 1 Ch. 84, Sec. 31.
- Hubbard vs. Ewing, 63 Tenn. 404, Sec. 222.
 vs. Gurney, 64 N. Y. 457, Sec. 85, 112.
 vs. Haley, 96 Wis. 578, Sec. 61.
 vs. Ogden, 22 Kan. 363, Sec. 83.
 vs. Reilly, 51 Ind. App. 19, Sec. 76-a, 79, 103.
- Hubert vs. Mendheim, 64 Cal. 213, Sec. 147.
- Hudelson vs. Armstrong, 70 Ind. 99, Sec. 119.
- Hudson vs. Barratt, 62 Kan. 137, Sec. 220.
 vs. Miles, 185 Mass. 582, Sec. 106, 108.
- Huebner vs. Nims, 132 Mich. 657, Sec. 159.
- Huff vs. Hutchinson, 14 Howard 586, Sec. 205.
- Huffman vs. Koppelkom, 8 Neb. 344, Sec. 164.
- Huffmond vs. Bence, 128 Ind. 131, Sec. 259.
- Huggins vs. People, 39 Ill. 241, Sec. 14, 232.
- Hughes vs. Board of Comrs., 50 Okla. 410, Sec. 152.
 vs. Boone, 81 N. C. 204, Sec. 263.
 vs. Lawson, 31 Ark. 613, Sec. 40.
 vs. Littlefield, 18 Me. 400, Sec. 16, 56.
 vs. Newsom, 86 N. C. 424, Sec. 210.
 vs. People, 82 Ill. 78, Sec. 160.
 vs. Peper Co., 139 N. C. 158, Sec. 58.
- Hulett vs. Soullard, 26 Vt. 295, Sec. 282, 283.
- Hull vs. Brown, 35 Wis. 652, Sec. 32.
 vs. Godfrey, 31 Neb. 204, Sec. 244.
- Hummelstown Brownstone Co. vs. Knerr, 25 Pa. Sup. Ct. 465, Sec. 85.
- Humphrey vs. Taggart, 38 Ill. 228, Sec. 212.
- Humphreys vs. St. Louis, T. M. S. Ry. Co., 37 Fed. Rep. 307, Sec. 41.
- Humboldt Sav. & Loan Soc. vs. Wennehold, 81 Cal. 528, Sec. 125, 130.
- Hundley vs. Filbert, 73 Mc. 34, Sec. 19.
- Hunt vs. Gray, 35 N. J. L. 227, Sec. 74.
 vs. Hopkins, 83 Mo. 13, Sec. 187.
 vs. Roberts, 45 N. Y. 691, Sec. 71.
 vs. State, 124 Ind. 306, Sec. 160.
 vs. Taylor, 108 Mass. 508, Sec. 187.
- Hunter vs. United States, 5 Pet. 173, Sec. 187.
- Huntington vs. Knox, 7 Cush. 371, Sec. 142.
- Huntsville Bank vs. Hill, 1 Stew. (Ala.) 201, Sec. 130.
- Huntley vs. Huntley, 114 U. S. 394, Sec. 25.
- Hungerford vs. O'Brien, 37 Minn. 306, Sec. 67.
- Hurd vs. Barnhart, 53 Cal. 97, Sec. 208.
 vs. Dunsmore, 63 N. H. 171, Sec. 135.

(References are to sections.)

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 Hurley vs. Fidelity & Dep. Co., 95 Mo. App. 88, Sec. 50.
 Huron vs. Armstrong, 27 Up. Can. (Q. B.) 533, Sec. 111.
 Hurst vs. Jennings, 5 Barn. & Cr. 650, Sec. 135.
 Hursey vs. Marty, 61 Minn. 430, Sec. 164.
 Husbands vs. Commonwealth, 143 Ky. 290, Sec. 228, 231.
 Husak vs. Clifford, 179 Ind. 173, Sec. 23-a.
 Hutcheson vs. Reash, 15 Pa. Super. Ct. 96, Sec. 261.
 Hutcherson vs. Pigg, 8 Gratt. 220, Sec. 218.
 Hutchins vs. Munn, 209 U. S. 246, Sec. 196.
 Hutchinson vs. State, 43 Tenn. 95, Sec. 230.
 vs. Woodwell, 107 Pa. St. 509, Sec. 17, 99.
 Hutton vs. Campbell, 10 Lea (Tenn.) 170, Sec. 257.
 vs. Lockridge, 27 W. Va. 428, Sec. 188.
 vs. Padgett, 26 Md. 228, Sec. 27.
 Huyler vs. Atwood, 26 N. J. Eq. 504, Sec. 23.
 Hyatt vs. Grover & Baker S. M. Co., 41 Mich. 225, Sec. 129.
 Hyde vs. Miller, 45 App. Div. (N. Y.) 396, Sec. 284.
 vs. State, 52 Miss. 665, Sec. 145.
 vs. Tracy, 2 Day (Conn.) 491, Sec. 270.
 Hydraulic Press Brick Co. vs. Neumeister, 15 Mo. App. 592, Sec. 128, 190.
 Hyland vs. Habich, 150 Mass. 112, Sec. 71, 119.

I

- Ida County Sav. Bank vs. Seidensticker, 128 Iowa 54, Sec. 96, 106, 129.
 Ide vs. Churchill, 14 O. S. 372, Sec. 81, 88, 114.
 vs. Stanton, 15 Vt. 685, Sec. 29.
 Ihrig vs. Bussell, 68 Wash. 70, Sec. 214.
 Ijames vs. Gaither, 93 N. C. 358, Sec. 255.
 Iliff vs. Weymouth, 40 O. S. 101, Sec. 115.
 Illinois Industrial Home vs. Dreyer, 150 Ill. App. 574, Sec. 153.
 Illinois Surety Co. vs. John Davis Co., 244 U. S. 376, Sec. 131.
 vs. Munro, 289 Ill. 574, Sec. 6.
 vs. Peeler, 240 U. S. 214, Sec. 131.
 Indemnity Co. vs. Granite Co., 100 O. S. 373, Sec. 131, 233.
 vs. Waters, 110 Md. 673, Sec. 19.
 Indiana & Ohio Live Stock Ins. Co. vs. Bender, 32 Ind. App. 287, Sec. 106.
 Indianola vs. Gulf W. T. & P. Ry., 56 Tex. 594, Sec. 136.
 Ingels vs. Sutliff, 36 Kan. 444, Sec. 115.
 Ingersoll vs. Baker, 41 Mich. 48, Sec. 2.
 vs. Roe, 65 Barb. 346, Sec. 14.
 Inglis vs. State, 61 Ind. 212, Sec. 166.
 Ingraham vs. Maine Bank, 13 Mass. 208, Sec. 156.
 Ingram vs. Greenwade, 12 Ky. L. Rep. 942, Sec. 181.
 vs. McCombs, 17 Mo. 558, Sec. 157.
 vs. State, 27 Ala. 17, Sec. 232.
 Inhabitants of Prescott vs. Moan, 50 Me. 347, Sec. 121.
 Inkster vs. First Bank, 30 Mich. 143, Sec. 115.
 Inman vs. Sherrill, 29 Okl. 100, Sec. 164.
 Insurance Co. vs. Doll, 35 Md. 89, Sec. 49.
 vs. Hawk, 83 Mo. 21, Sec. 81.
 vs. McGookey, 33 O. S. 555, Sec. 241.

(References are to sections.)

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 International Hotel Co. vs. Flynn, 238 Ill. 637, Sec. 143.
 Iowa Loan & Trust Co. vs. Haller, 119 Iowa 645, Sec. 90.
 Irby vs. Livingston, 81 Ga. 281, Sec. 248.
 Irby vs. Black, 17 N. J. Eq. 189, Sec. 115.
 Irons vs. Woodfill, 32 Ind. 40, Sec. 93.
 Iroquois Mfg. Co. vs. Annan-Burg Milling Co., 179 Mo. App. 87, Sec. 190.
 Irwin vs. Backus, 25 Cal. 214, Sec. 221.
 vs. Crook, 17 Col. 16, Sec. 181.
 vs. Thompson, 4 Bibb (Ky.) 205, Sec. 22.
 Isnard vs. Torres & Marquez, 10 La. Ann. 103, Sec. 74.
 Issaquan Coal Co. vs. U. S. Fidelity & Guar. Co., 126 Fed. 89, Sec. 239.
 Ives vs. Bosley, 35 Md. 262, Sec. 8, 10.
 vs. Hulce, 17 Ill. App. 35, Sec. 185.
 vs. Merchants Bank, 12 How. 159, Sec. 188.

J

- Jack vs. Morrison, 48 Pa. 113, Sec. 255.
 Jackson vs. Fidelity & Casualty Co., 75 Fed. Rep. 359, Sec. 241.
 vs. Jackson, 7 Ala. 791, Sec. 16.
 vs. Lowe, 1 Bing. 9, Sec. 29.
 Jacquemine vs. State, 48 Miss. 280, Sec. 147.
 Jacques vs. Fackney, 64 Ill. 87, Sec. 250.
 Jacobson vs. Metzgar, 43 Mich. 403, Sec. 213.
 James vs. Day, 37 Iowa 164, Sec. 90.
 vs. Hendree, 34 Ala. 488, Sec. 138.
 vs. Jacques, 26 Tex. 320, Sec. 244.
 vs. Williams, 5 Barn. & Ad. 1109, Sec. 26.
 Jameson vs. Citizens National Bank, 130 Md. 75, Sec. 8.
 Jamieson vs. Holm, 69 Ill. App. 119, Sec. 6, 102.
 Jarratt vs. Martin, 70 N. C. 459, Sec. 117.
 Jane's Ex. vs. Platt, 47 O. S. 262, Sec. 203, 205, 206.
 Jefferson vs. Asch, 53 Minn. 446, Sec. 142.
 Jeffery vs. Underwood, 1 Ark. 108, Sec. 122.
 Jemison vs. Governor, 47 Ala. 390, Sec. 114.
 Jenkins vs. Clarkson, 7 O. 72, Sec. 82, 84.
 vs. Harrison, 66 Ala. 345, Sec. 29.
 vs. National Bank, 58 Me. 275, Sec. 99.
 vs. Reynolds, 3 Brod. & Bing. 14, Sec. 26.
 vs. Skillern, 5 Yerg. (Tenn.) 288, Sec. 161.
 Jenner vs. Morris, 3 DeG. F. & J. 45, Sec. 259.
 Jenness vs. City of Black Hawk, 2 Colo. 578, Sec. 191.
 vs. Cutler, 12 Kas. 500, Sec. 83.
 Jerauld vs. Trippet, 62 Ind. 122, Sec. 99.
 Jerman vs. Stewart, 12 Fed. Rep. 266, Sec. 203, 205.
 Jerome vs. Ortman, 66 Mich. 668, Sec. 122.
 Jessup vs. United States, 106 U. S. 147, Sec. 146.
 Jester vs. Gustin, 158 Ind. 287, Sec. 218.

(References are to sections.)

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 Jewett vs. Crane, 35 Barb. 208, Sec. 206.
 Jewett Pub. Co. vs. Butler, 159 Mass. 517, Sec. 138.
 Job vs. Harlan, 13 O. S. 485, Sec. 191.
 Johnson vs. Brown, 51 Ga. 498, Sec. 52.
 vs. Buck, 35 N. J. L. 338, Sec. 29.
 vs. Eaton Milling Co., 18 Col. 331, Sec. 132.
 vs. Elwood, 82 N. Y. 362, Sec. 193.
 vs. Flint, 34 Ala. 673, Sec. 186.
 vs. Goldsborough, 1 Harr. & J. (Md.) 409, Sec. 181.
 vs. Hacker, 8 Heisk. (Tenn.) —, Sec. 87.
 vs. Harris, 69 Ind. 305, Sec. 118.
 vs. Harvey, 84 N. Y. 363, Sec. 68, 273.
 vs. Hicks' Guardian, 97 Ky. 116, Sec. 224.
 vs. Hogan, 37 Tex. 77, Sec. 223.
 vs. Mann, 77 Va. 265, Sec. 150.
 vs. McGruder, 15 Mo. 365, Sec. 22.
 vs. Noonan, 16 Wis. 687, Sec. 198.
 vs. Reed, 47 Neb. 322, Sec. 185.
 vs. Stapleton Co., 132 Ga. 164, Sec. 39.
 vs. Success Brick Mach. Co., 93 Miss. 169, Sec. 95.
 vs. Ward, 21 Ky. L. Rep. 783, Sec. 188.
 vs. Weatherwax, 9 Kan. 75, Sec. 109.
 vs. Williams, 111 Ky. 289, Sec. 170.
 vs. Young, 20 W. Va. 614, Sec. 23, 90, 100.
 vs. Zink, 51 N. Y. 333, Sec. 23, 251.
 Johnston vs. Chapman, 3 Penn. & W. (Pa.) 18, Sec. 61.
 vs. Cole, 102 Iowa 109, Sec. 109.
 vs. Kimball, 39 Mich. 187, Sec. 149.
 vs. Maples, 49 Ill. 101, Sec. 217.
 vs. May, 76 Ind. 293, Sec. 20, 77.
 vs. Patterson, 114 Pa. 398, Sec. 15, 108.
 Jones vs. Bacon, 145 N. Y. 446, Sec. 34.
 vs. Bangs, 40 O. S. 139, Sec. 74.
 vs. Beach, 2 DeGex. M. & G. 886, Sec. 119.
 vs. Blanton, 6 Ired. Eq. (N. C.) 115, Sec. 263, 275.
 vs. Bradford, 25 Ind. 305, Sec. 271.
 vs. Britt, 168 F. 852, Sec. 57.
 vs. Dronebergér, 23 Ind. 74, Sec. 183.
 vs. Gibson, 82 Ky. 561, Sec. 248.
 vs. Goodwin, 39 Cal. 493, Sec. 10.
 vs. Gordon, 82 Ga. 570, Sec. 228.
 vs. Harris, 90 Ark. 51, Sec. 245.
 vs. Irvine, 23 Miss. 361, Sec. 220.
 vs. Jones, 38 Mo. 429, Sec. 206.
 vs. Lucas County Commissioners, 57 O. S. 169, Sec. 164.
 vs. Newman, 36 Hun 634, Sec. 146.

(References are to sections.)

- Jones vs. Orchard, 16 C. B. 614, Sec. 279.
 vs. Quinnopiack Bank, 29 Conn. 25, Sec. 255.
 vs. Rosedale St. Ry., 75 Tex. 382, Sec. 197.
 vs. Rountree, 11 Ga. App. 181, Sec. 197.
 vs. Sarchett, 61 Iowa 520, Sec. 85.
 vs. Short, 53 Ore. 525, Sec. 201.
 vs. Shorter, 1 Kelley (Ga.) 294, Sec. 34.
 vs. Trimble, 3 Rawle (Pa.) 381, Sec. 280.
 vs. Ward, 71 Wis. 152, Sec. 102.
- Jordan vs. Adams, 7 Ark. 348, Sec. 282.
 vs. Agawam Woolen Co., 106 Mass. 571, Sec. 185.
 vs. Dobbins, 122 Mass. 168, Sec. 71, 119.
 vs. Kavanaugh, 63 Iowa 152, Sec. 125, 131.
- Joslyn vs. Collinson, 26 Ill. 61, Sec. 9.
 vs. Eastman, 46 Vt. 258, Sec. 96.
- Josselyn vs. Edwards, 57 Ind. 212, Sec. 248.
- Journal Pub. Co. vs. Barber, 165 N. C. 478, Sec. 245, 259.
- Judah vs. Zimmerman, 22 Ind. 388, Sec. 132.
- Judge of Probate vs. Couch, 59 N. H. 39, Sec. 220.
 vs. Toothaker, 83 Me. 195, Sec. 224.
- Junction City vs. Keefe, 40 Kas. 275, Sec. 228.
- Justice vs. Lang, 42 N. Y. 493, Sec. 28.
 vs. Tallman, 86 Pa. 147, Sec. 40.
- Justices vs. Ennis, 5 Ga. 569, Sec. 21.

K

- Kagay vs. Trustees, 68 Ill. 75, Sec. 156.
- Kaler vs. Hise, 79 Ind. 301, Sec. 83.
- Kane vs. Casgrain, 69 Wis. 430, Sec. 193.
 vs. Cortesy, 100 N. Y. 132, Sec. 86.
 vs. State, ex rel., Woods, 78 Ind. 103, Sec. 254.
- Kansas City Terra Cotta Lumber Co. vs. Murphy, 49 Neb. 674, Sec. 108.
- Kansas City vs. O'Connell, 99 Mo. 357, Sec. 131.
- Kansas City Sewer Pipe Co. vs. Thompson, 120 Mo. 218, Sec. 131.
- Karr vs. Peter, 60 Ill. App. 209, Sec. 135.
- Kasson vs. Brocker, 47 Wis. 79, Sec. 181.
- Kattleman vs. Guthrie's Estate, 142 Ill. 357, Sec. 226.
- Katz vs. Moessinger, 110 Ill. 372, Sec. 279.
- Kaufman vs. Seaboard Air Line Ry. Co., 10 Ga. App. 248, Sec. 214.
- Kaufmann vs. Cooper, 46 Neb. 644, Sec. 76-a, 131.
- Kautzman vs. Weirich, 26 O. S. 332, Sec. 117.
- Kay vs. Groves, 6 Bing. 276, Sec. 18, 60.
- Keach vs. Hamilton, 84 Ill. App. 413, Sec. 281.
- Kealhofer vs. Emmert, 79 Md. 248, Sec. 218.
- Kealing vs. Vansickle, 74 Ind. 529, Sec. 112.
- Kearney vs. Andrews, 10 N. J. Eq. 70, Sec. 150.
 vs. Sascor, 37 Md. 264, Sec. 221.

(References are to sections.)

- Kearsley vs. Cole, 16 M. & W. 128, Sec. 92, 114.
 Keate vs. Temple, 1 B. & P. 158, Sec. 36.
 Keel vs. Larkin, 72 Ala. 493, Sec. 248.
 Keen vs. Whittington, 40 Md. 489, Sec. 134, 181.
 Keirn vs. Andrews, 59 Miss. 39, Sec. 115.
 Keiser vs. Beam, 117 Ind. 31, Sec. 274.
 Keith vs. Goodwin, 31 Vt. 268, Sec. 75.
 Keith County vs. Ogalalla Power & Irrigation Co., 64 Neb. 35, Sec. 126.
 Keithler vs. Foster, 22 O. S. 27, Sec. 178.
 Keithsburg & E. R. R. vs. Henry, 90 Ill. 255, Sec. 190.
 Kellar vs. Williams, 10 Bush. (Ky.) 216, Sec. 254.
 Keller vs. Ashford, 133 U. S. 610, Sec. 90, 255.
 vs. Boatman, 49 Ind. 104, Sec. 232.
 Kelley vs. Whitney, 45 Wis. 110, Sec. 255.
 Kellock's Case, 3 Ch. App. 769, Sec. 252.
 Kellog vs. Howes, 93 Cal. 586, Sec. 138.
 vs. Miller, 22 Ore. 406, Sec. 252.
 vs. Scott, 58 N. J. Eq. 344, Sec. 76.
 Kellogg vs. Kimball, 142 Mass. 124, Sec. 206.
 vs. State, 43 Miss. 57, Sec. 232, 246.
 Kelly vs. Herrick, 131 Mass. 373, Sec. 255.
 vs. State, etc., 25 O. S. 567, Sec. 19, 21, 156.
 vs. West, 80 N. Y. 139, Sec. 221.
 Kemp vs. Finden, 12 M. & W. 421, Sec. 271, 283.
 Kemper vs. Galveston Co., 73 Tex. 216, Sec. 154.
 Kendrick vs. Forney, 22 Gratt. 748, Sec. 282.
 Kennedy, In re, 129 Cal. 384, Sec. 184.
 Kennedy vs. Brown, 21 Kan. 171, Sec. 213.
 vs. Goss, 38 N. Y. 330, Sec. 88.
 vs. Pickens, 3 Ired. Eq. N. C. 147, Sec. 248.
 Kennedy, etc., Co. vs. S. S. Const. Co., 123 Cal. 584, Sec. 57.
 Kenneweg Co. vs. Finney, 98 Md. 114, Sec. 58.
 Kenworthy vs. Sawyer, 125 Mass. 28, Sec. 92.
 Kenyon vs. Farris, 47 Conn. 510, Sec. 259.
 Keokuk vs. Love, 31 Iowa 119, Sec. 245.
 Keokuk County Bank vs. Hall, 106 Iowa 540, Sec. 104.
 Kepley vs. Carter, 49 Kan. 72, Sec. 50.
 Keppel vs. Tiffin Savings Bank, 197 U. S. 356, Sec. 287.
 Kerr vs. Cameron, 19 U. C. C. P. (Q. B.) 366, Sec. 94.
 vs. Reece, 27 Kan. 469, Sec. 203.
 vs. Shaw, 13 Johns. 236, Sec. 27.
 Kemmerer vs. Wilson, 31 Pa. 110, Sec. 99.
 Kernochan vs. Murray, 111 N. Y. 306, Sec. 71, 119.
 Kester vs. Hill, 42 W. Va. 611, Sec. 224.
 Ketler vs. Thompson, 13 Bush. (Ky.) 287, Sec. 263.
 Keyes vs. Allen, 65 Vt. 667, Sec. 43.
 Kiel vs. Choate, 92 Wis. 517, Sec. 278.
 Kiernan vs. Cameron, 66 Miss. 442, Sec. 187.
 Kiersted vs. Orange & Alexandria R. R. Co., 69 N. Y. 343, Sec. 142.

(References are to sections.)

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 Killian vs. Ashley, 24 Ark. 511, Sec. 8, 10, 57.
 vs. Clark, 111 U. S. 784, Sec. 181.
 Killfoil vs. Moore, 45 S. W. (Tex. Civ. App.) 1024, Sec. 188.
 Kilpatrick vs. Haley, 6 Col. App. 407, Sec. 193.
 Kimball vs. Baker, 62 Wis. 526, Sec. 77, 125.
 vs. Newell, 7 Hill 116, Sec. 104.
 vs. Royce, 9 Rich. Law (S. C.) 295, Sec. 56.
 Kimball Ptg. Co. vs. Southern Land Improvement Co., 57 Minn. 37, Sec. 186.
 Kimmel vs. Lowe, 28 Minn. 265, Sec. 248, 249.
 Kinard vs. Baird, 20 S. C. 377, Sec. 249.
 Kincaid vs. Yates, 63 Mo. 45, Sec. 97.
 Kindt's Appeal, 102 Pa. 441, Sec. 99.
 King vs. Baldwin, 17 Johns. 384, Sec. 116.
 vs. Batterson, 13 R. I. 117, Sec. 66.
 vs. Downey, 24 Ind. App. 262, Sec. 131.
 vs. Murphy, 49 Neb. 670, Sec. 76-a.
 vs. Nichols, 16 O. S. 80, Sec. 156, 170.
 vs. State, 81 Ala. 92, Sec. 109.
 vs. State, 18 Neb. 375, Sec. 232.
 King County vs. Ferry, 5 Wash. 536, Sec. 74, 87, 153.
 Kingsbury vs. Westfall, 61 N. Y. 356, Sec. 2.
 Kinney vs. Schmitt, 12 Hun 521, Sec. 124.
 Kirby vs. W. S. & L. P. Ry. Co., 109 Ill. 412, Sec. 49.
 Kirkendall vs. Hartsock, 58 Mo. App. 234, Sec. 214.
 Kirkpatrick vs. Howk, 80 Ill. 122, Sec. 98.
 Kirschbaum & Co. vs. Blair, 98 Va. 35, Sec. 76.
 Kissire vs. Plunkett-Jarrell Co., 103 Ark. 473, Sec. 16, 91, 118.
 Kitson vs. Farwell, 132 Ill. 327, Sec. 110.
 Kittridge vs. Stegmier, 11 Wash. 3, Sec. 115.
 Klaproth vs. Greenberg, 147 Ill. App. 380, Sec. 215.
 Klein vs. Funk, 82 Minn. 3, Sec. 280.
 vs. Kern, 94 Tenn. 34, Sec. 61.
 Kleinhaus vs. Generous, 25 O. S. 667, Sec. 89.
 Klepper vs. Borchsenius, 13 Ill. App. 318, Sec. 262.
 Kline vs. Raymond, 70 Ind. 271, Sec. 66, 67.
 Klingensmith vs. Klingensmith, 31 Pa. 460, Sec. 114.
 Klippel vs. Oppenstein, 8 Colo. App. 187, Sec. 205.
 Klopp vs. Lebanon Bank, 46 Pa. 88, Sec. 244.
 Klosterman vs. Olcott, 25 Neb. 382, Sec. 66.
 vs. United Elec. Co., 101 Md. 29, Sec. 57.
 Knaffel vs. Banking Co., 133 Tenn. 55, Sec. 248.
 Knapp vs. Swaney, 56 Mich. 345, Sec. 131.
 vs. Van Etten, 55 Hun 428, Sec. 188.
 Knepper vs. Glenn, 73 Iowa 730, Sec. 226.
 Knickerbocker vs. Wilcox, 83 Mich. 200, Sec. 11.
 Knickerbocker Trust Co. vs. Carteret Steel Co., 82 Atl. 146, Sec. 248.
 Knight vs. Charter, 22 W. Va. 422, Sec. 99.
 vs. Dunsmore & Chambers, 12 Iowa 35, Sec. 8.
 vs. Waters, 18 Iowa 345, Sec. 182.

(References are to sections.)

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 Knotts vs. Butler, 10 Rich. Eq. (S. C.) 143, Sec. 71.
 Knowlton vs. Hersey, 76 Me. 345, Sec. 59.
 Knox vs. Kearns, 73 Iowa 286, Sec. 224.
 Knox Co. vs. Johnson, 124 Ind. 145, Sec. 148.
 Knox Co. Bank vs. Lloyd's Admr., 18 O. S. 353, Sec. 78.
 Koch vs. Williams, 82 Wis. 186, Sec. 28.
 Koch's Estate, 148 Wis. 548, Sec. 262.
 Koelling vs. Wachsning, 174 Ill. App. 321, Sec. 186.
 Koelsch vs. Mixer, Admr., 52 O. S. 207, Sec. 276.
 Koenigsberg vs. Lennig, 161 Pa. 171, Sec. 57, 92.
 Kohn Bros. vs. Washer, 69 Tex. 67, Sec. 12.
 Konitzky vs. Meyer, 49 N. Y. 571, Sec. 279, 286.
 Kortlander vs. Elston, 2 C. C. A. 657, Sec. 252.
 Kountz vs. Kennedy, 63 Pa. 187, Sec. 74.
 Kountze vs. Omaha Hotel Co., 107 U. S. 378, Sec. 179, 183, 188.
 Krafts vs. Creighton, 3 Rich. L. (S. C.) 273, Sec. 279.
 Krall vs. Libbey, 53 Wis. 292, Sec. 190.
 Kramer vs. Bankers' Surety Co., 90 Neb. 301, Sec. 247.
 Kramph's Executrix vs. Hatz's Executors, 52 Pa. St. 525, Sec. 6, 275.
 Kranichfelt vs. Slattey, 33 N. Y. S. 27, Sec. 123.
 Kreider vs. Isenbice, 123 Ind. 10, Sec. 261.
 Kretschmar vs. Bruss, 108 Wis. 396, Sec. 76-a.
 Krone vs. Cooper, 43 Ark. 547, Sec. 185.
 Krug vs. Bishop, 44 O. S. 221, Sec. 193.
 Kuhl vs. Chamberlain, 140 Iowa 546, Sec. 17.
 Kulp vs. Brant, 162 Pa. 222, Sec. 108.
 Kunkel vs. Fitzhugh, 22 Md. 567, Sec. 255.
 Kuns vs. Young, 34 Pa. 60, Sec. 104.
 Kunz vs. Boll, 140 Wis. 69, Sec. 76-b.
 Kunzweiler vs. Lehman, 70 N. Y. S. 290, Sec. 76-a.
 Kuriger vs. Joest, 22 Ind. App. 633, Sec. 134.
 Kyger vs. Sipe, 89 Va. 507, Sec. 11-a.
 Kyle vs. Bostick, 10 Ala. 589, Sec. 83.

L

- Labbe vs. Bernardy, 196 Ind. 551, Sec. 274.
 LaBelle Iron Works vs. Quarter Sav. Bank, 82 S. E. 614, Sec. 122.
 Lackawanna Trust & Safe Dep. Co. vs. Gomeringer, 236 Pa. 179, Sec. 244.
 Lackey vs. Steere, 121 Ill. 598, Sec. 100.
 Lacoste vs. Bexar Co., 28 Tex. 420, Sec. 174.
 Ladd vs. Board, 80 Ill. 233, Sec. 108.
 vs. Chamber of Commerce, 37 Oreg. 49, Sec. 275.
 La Du-King Mfg. Co. vs. La Du, 36 Minn. 473, Sec. 25.
 Ladies of Maccabees vs. Illinois Surety Co., 196 Mich. 27, Sec. 76a, 241.
 La Farge vs. Herter, 9 N. Y. 241, Sec. 97.
 LaFayette Co. vs. Hixon, 69 Mo. 581, Sec. 98.

(References are to sections.)

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 Lagomersino vs. Gianini, 146 Cal. 545, Sec. 57.
 Laing vs. Lee, 20 N. J. Law 337, Sec. 27.
 Laingor vs. Lowenthal, 151 Ill. App. 599, Sec. 57.
 Lake vs. Brutton, 8 DeG. M. & G. 440, Sec. 244.
 vs. Hargis, 82 Kan. 711, Sec. 214.
 vs. Thomas, 84 Md. 608, Sec. 76, 106.
 Lakeman vs. Mountstephen, 7 Eng. & Ir. App. 17, Sec. 38.
 Lallande vs. Trezevant, 39 La. Ann. 830, Sec. 196.
 Lamb vs. Shaw, 43 Minn. 507, Sec. 197.
 Lambert vs. Haskell, 80 Cal. 611, Sec. 194, 195, 196.
 Lambden vs. Conoway, 5 Harr. (Del.) 1, Sec. 210.
 Lamm & Col. vs. Colcord, 22 Okl. 493, Sec. 52.
 Lammon vs. Feusier, 111 U. S. 17, Sec. 164.
 Lambrecht vs. State, 57 Md. 240, Sec. 218.
 Lane vs. Doty, 4 Barb. 530, Sec. 119.
 vs. Duchac, 73 Wis. 646, Sec. 51.
 vs. Howell, 1 B. J. Lea (Tenn.) 275, Sec. 87.
 vs. Hyder, 163 Mo. App. 688, Sec. 91-a.
 vs. Moon, 103 S. W. 211, Sec. 114.
 vs. State, 24 Ind. 421, Sec. 219.
 Lane Implement Co. vs. Lowder, 65 Pac. Rep. (Okl.) 926, Sec. 203.
 Lancaster Co. vs. Callahan, 68 Minn. 277, Sec. 107.
 Lance vs. Pearce, 101 Ind. 595, Sec. 36.
 Landa vs. Heerman, 85 Tex. 1, Sec. 181.
 Landis vs. Royer, 59 Pa. 95, Sec. 42.
 Lange vs. Benedict, 73 N. Y. 12, Sec. 168.
 Langdon vs. Hughes, 107 Mass. 272, Sec. 38.
 vs. Richardson, 58 Iowa 610, Sec. 36.
 Langford vs. Freeman, 60 Ind. 46, Sec. 45.
 Langworthy vs. McKelvey, 25 Iowa 48, Sec. 197.
 Lansley vs. Nietert, 78 Iowa 758, Sec. 197.
 Lansdale's Admrs. vs. Cox, 7 T. B. Mon. 401, Sec. 262.
 Large vs. Steer, 121 Pa. 30, Sec. 193.
 Larsen vs. Winder, 20 Wash. 419, Sec. 126.
 Larson vs. Jensen, 53 Mich. 427, Sec. 36.
 vs. Wyman, 14 Wend (N. Y.) 246, Sec. 36.
 LaRose, et al., vs. Logansport Nat. Bank, 102 Ind. 332, Sec. 6, 71, 107,
 126, 130.
 Lasher vs. Williamson, 55 N. Y. 619, Sec. 117.
 Lashus vs. Matthews, 75 Me. 446, Sec. 172.
 Lascelles vs. Clark, 204 Mass. 362, Sec. 66.
 Latham vs. Houston Flour Mills, 68 Tex. 127, Sec. 8, 10.
 Lathrop vs. Atwood, 21 Conn. 117, Sec. 281.
 Lawrenson vs. Butler, 1 Sch. & Lef. 13, Sec. 28.
 Lauman vs. Nichols, 15 Iowa 161, Sec. 90.
 Lauer Brewing Co. vs. Riley, 195 Pa. 449, Sec. 106.
 Law vs. East India Co., 4 Ves. Jr. 824, Sec. 2.

(References are to sections.)

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 Lawson vs. Wright, 1 Cox. 275, Sec. 271.
 Lawrence vs. Doolan, 68 Cal. 309, Sec. 144.
 vs. McCalmont, 2 How. (U. S.) 426, Sec. 16, 18, 48, 50.
 vs. Oakey, 14 La. 367, Sec. 10.
 vs. Thom, 9 Wyo. 414, Sec. 83.
 Layer vs. Nelson, 1 Vern. 456, Sec. 262.
 Laylin vs. Knox, 41 Mich. 40, Sec. 251.
 Lazelle vs. Miller, 40 Ore. 549, Sec. 90.
 Lea vs. Collins, 36 Tenn. 393, Sec. 138.
 Leal vs. State, 51 Tex. Cr. App. 425, Sec. 228.
 Leach vs. Fleming, 85 N. C. 447, Sec. 121.
 Leachman vs. Dougherty, 81 Ill. 324, Sec. 172.
 Leake vs. Ball, 116 Ind. 214, Sec. 142.
 Leary vs. United States, 224 U. S. 567, Sec. 279.
 Leavitt vs. Rosenberg, 83 O. S. 230, Sec. 202.
 Leckie vs. Scott, 5 La. 631, Sec. 19.
 Ledbetter vs. McGhees, 84 Ga. 227, Sec. 40.
 Ledford vs. Hinson, 143 Ky. 428, Sec. 32, 156.
 Lee vs. Burrell, 51 Mich. 132, Sec. 281.
 vs. Charmley, 20 N. D. 570, Sec. 164.
 vs. Dick, 10 Peters 482, Sec. 18, 49, 65.
 vs. Hastings, 13 Neb. 508, Sec. 17.
 vs. Jones, 17 C. B. N. S. 482, Sec. 15, 106.
 vs. Lee, 67 Ala. 406, Sec. 224.
 vs. Manley, 154 N. C. 244, Sec. 96.
 vs. Peckham, 17 Wis. 383, Sec. 97.
 vs. State, 25 Tex. App. 331, Sec. 231.
 vs. Wisner, 38 Mich. 82, Sec. 16, 57.
 vs. Yandell, 69 Tex. 34, Sec. 11-a, 104.
 Lee Co. vs. Welsing, 70 Iowa 198, Sec. 109.
 Leeds vs. Dunn, 10 N. Y. 469, Sec. 76.
 Leeper vs. Paschal, 70 Mo. App. 117, Sec. 264.
 Leesley Bros. vs. Rebori Fruit Co., 162 Mo. App. 195, Sec. 46.
 Leftkovitz vs. First Nat. Bank, 152 Ala. 521, Sec. 57, 61.
 Leggett vs. McClelland, 39 O. S. 624, Sec. 253.
 Leghorn vs. Nydell, 39 Wash. 17, Sec. 76-b.
 Lehigh Coal & Iron Co. vs. Scallen, 61 Minn. 63, Sec. 59.
 Lehman vs. McQuown, 31 Fed. Rep. 138, Sec. 196.
 vs. Robertson, 84 Ala. 489, Sec. 166.
 Leigh vs. Taylor, 7 Barn. & Cr. 491, Sec. 163.
 Leighton vs. Brown, 98 Mass. 515, Sec. 214.
 Lemmert vs. Guthrie Bros., 69 Neb. 499, Sec. 61, 67.
 Lemmon vs. Strong, 55 Conn. 443, Sec. 51.
 vs. Whitman, 75 Ind. 318, Sec. 83.
 Lemp Brewing Co. vs. Secor, 21 Okl. 537, Sec. 23-a.
 Lengle vs. Smith, 48 Mo. 276, Sec. 181.
 Lennox vs. Brower, 160 Pa. 191, Sec. 43.
 vs. Murphy, 171 Mass. 370, Sec. 57.

(References are to sections.)

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vs. Vredenburg, 8 Johns. 29, Sec. 27.
vs. Wildes, 36 Me. 265, Sec. 8, 9, 10.
- Lerch vs. Gallup, 67 Cal. 595, Sec. 32.
- Leroux vs. Brown, 12 C. B. 801, Sec. 47.
- Lescouzeve vs. Ducatel, 18 La. Ann. 470, Sec. 171.
- Leshner vs. U. S. Fidelity & Guar. Co., 239 Ill. 502, Sec. 18, 233, 241.
- Leslie vs. Conway, 59 Cal. 442, Sec. 93.
- Lester vs. Houston, 101 N. C. 605, Sec. 118.
- Lester Piano Co. vs. Romney, 126 Pac. 325, Sec. 66.
- Levy vs. Cohen, 92 N. Y. S. 1074, Sec. 52.
vs. Merrill, 4 Greenl. 180, Sec. 27.
- Lewark vs. Carter, 117 Ind. 206, Sec. 170.
- Lewis vs. Armstrong, 80 Ga. 402, Sec. 114.
vs. Brewster, 2 McLean 21, Sec. 67.
vs. Collier, 47 So. 790, Sec. 196.
vs. Lee Co., 73 Ala. 148, Sec. 174.
vs. Maulden, 93 Ga. 758, Sec. 185.
vs. Palmer, 28 N. Y. 271, Sec. 244, 250.
vs. United States, 92 U. S. 618, Sec. 252.
- Lewis, Admr. vs. U. S. Fidelity & Guar. Co., 144 Ky. 425, Sec. 236, 244, 248.
- Lewiston vs. Gagne, 89 Me. 395, Sec. 109.
- Lexington & West Cambridge R. R. vs. Elwell, 90 Mass. 371, Sec. 129.
- Ley vs. Wise, 15 La. Ann. 38, Sec. 19.
- Lieberman vs. First Nat. Bank, 45 Atl. Rep. (Del.) 901, Sec. 15, 106.
- Lidderdale vs. Robinson, 2 Brock. 159, Sec. 244, 249, 253.
- Liddell vs. Wiswell, 59 Vt. 365, Sec. 272, 273.
- Liebke vs. Thomas, 116 U. S. 605, Sec. 287.
- Lillard vs. Lillard, 44 Ky. 340, Sec. 143.
- Lilly vs. Hays, 5 Ad. & Ell. 548, Sec. 142.
vs. Roberts, 58 Ga. 363, Sec. 98.
- Liles vs. Rogers, 113 N. C. 197, Sec. 244, 248.
- Lime Rock Bank vs. Mallett, 42 Me. 349, Sec. 83.
- Lincoln vs. Chapin, 132 Mass. 470, Sec. 172.
- Lindsay vs. Parkinson, 5 Irish Law Rep. 124, Sec. 77.
- Lindsey vs. Attorney General, 33 Miss. 508, Sec. 145.
vs. Hewitt, 42 Ind. App. 573, Sec. 214.
- Linder vs. Lake, 6 Iowa 164, Sec. 135.
- Lingenfelter vs. Bowman, 156 Iowa 649, Sec. 15.
- Lingle vs. Cook, 32 Gratt. 262, Sec. 219.
- Lininger vs. Whcat, 49 Neb. 567, Sec. 57.
- Linn vs. McLean, 85 Ala. 250, Sec. 28.
- Linn County, etc., vs. Farris, 52 Mo. 75, Sec. 15, 127.
- Linville vs. McDowell, 127 Ill. App. 303, Sec. 190.
- Lionberger vs. Krieger, 88 Mo. 160, Sec. 11-a, 80, 132, 134.
- Lipscomb vs. Grace, 26 Ark. 231, Sec. 287.
- Little vs. Bliss, 55 Kan. 94, Sec. 212.
- Littlefield vs. State, 1 Tex. App. 722, Sec. 231.

(References are to sections.)

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 vs. Frank, 70 Tenn. 300, Sec. 208.
 vs. Richardson, 34 N. H. 179, Sec. 286.
 vs. State, 46 Ark. 413, Sec. 231.
 Livermore Falls Trust & Banking Co. vs. Richmond Mfg. Co., 108 Me. 206,
 Sec. 118.
 Livingston vs. Anderson, 80 Ga. 175, Sec. 248.
 vs. Exum, 19 S. C. 223, Sec. 197.
 vs. Fidelity & Dep. Co., 76 O. S. 253, Sec. 233, 239.
 vs. Marshall, 82 Ga. 281, Sec. 117.
 vs. Woods, 20 Mont. 91, Sec. 166.
 Lloyd & Co. vs. Matthews, 223 Ill. 477, Sec. 11.
 Lloyd's vs. Harper, 16 Ch. Div. 290, Sec. 71, 119.
 Lobaugh vs. Thompson, 74 Mo. 600, Sec. 104.
 Lobenstein vs. Hymson, 90 Tenn. 606, Sec. 203.
 Locke vs. McVean, 33 Mich. 473, Sec. 125.
 Lockwood vs. Penn, 22 La. Ann. 29, Sec. 102.
 Loeb vs. Fleming, 15 Ill. App. 503, Sec. 260.
 Lochr vs. Colburn, 92 Ind. 24, Sec. 255.
 Loew vs. Stocker, 68 Pa. 226, Sec. 108.
 Logan vs. Anderson, 18 B. Mon. 114, Sec. 252.
 vs. Ogden, 101 Tenn. 392, Sec. 8.
 vs. Plummer, 70 N. C. 388, Sec. 138.
 Lomax vs. Witkowsky, 124 Ill. App. 261, Sec. 57.
 Lombard Investment Co. vs. American Surety Co., 65 Fed. 476, Sec. 241.
 Lompoc Valley Bank vs. Stephenson, 104 P. 449, Sec. 57.
 London Assurance Co. vs. Bold, 6 Ad. & Ell. 514, Sec. 2, 53.
 London Bank vs. Parrott, 125 Cal. 472, Sec. 50.
 London, etc., Bank vs. Smith, 101 Cal. 415, Sec. 61.
 London General Omnibus Co. vs. Holloway, 2 K. B. (1912) 72, Sec. 106.
 London & Brazilian Bank vs. Walker, 74 Hun 395, Sec. 197.
 Lonergan vs. Trust Co., 101 Texas 63, Sec. 233.
 Long vs. American Surety Co., 23 N. D. 492, Sec. 76-a, 76-b.
 vs. Davidson, 101 N. C. 170, Sec. 128.
 vs. Miller, 93 N. C. 227, Sec. 255.
 vs. Seay, 72 Mo. 648, Sec. 153.
 vs. Sullivan, 21 Colo. 109, Sec. 186.
 Longan vs. Taylor, 130 Ill. 412, Sec. 174.
 Longfellow vs. McGregor, 56 Minn. 312, Sec. 128, 135.
 Lonsdale vs. Lafayette Bank, 18 O. 126, Sec. 51.
 Loomis vs. Brown, 16 Barb. 325, Sec. 195.
 Looney vs. Hughes, 26 N. Y. 514, Sec. 162.
 Loosemore vs. Radford, 9 M. & W. 657, Sec. 281.
 Lord vs. Staples, 23 N. H. 448, Sec. 282.
 Lord Arlington vs. Merrieke, 2 Saund. 412, Sec. 2.
 Louder vs. Hunter, 32 S. D. 108, Sec. 188.
 Loughridge vs. Bowland, 52 Miss. 546, Sec. 248, 279, 280.
 Louis vs. Brown, 7 Ore. 326, Sec. 135.
 Louisiana Bank vs. Ledoux, 3 La. Ann. 674, Sec. 115.
 Louisville Mfg. Co. vs. Welch, 10 How. 461, Sec. 65.

(References are to sections.)

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Louisville Water Co. vs. Youngstown Bridge Co., 16 Ky. Law Rep. 350,
Sec. 135.
Love vs. Jersey City, 40 N. J. L. 456, Sec. 145.
vs. McCoy, 81 W. Va. 478, Sec. 146.
vs. Rockwell, 1 Wis. 382, Sec. 190.
vs. Voorhies, 13 La. Ann. 549, Sec. 202.
Lovelace vs. Lovelace, 136 Ky. 452, Sec. 15.
Loverin & Browne Co. vs. Travis, 135 Wis. 322, Sec. 61.
Loving vs. Auditor of Public Accounts, 76 Va. 942, Sec. 152.
Lovinger vs. First Nat. Bank, 81 Ind. 354, Sec. 97.
Low Bros. & Co. vs. Anderson, 41 Iowa 476, Sec. 11.
Lowe vs. Beckwith, 14 B. Mon. (Ky.) 184, Sec. 50.
vs. City of Guthrie, 4 Okl. 287, Sec. 163.
vs. Peers, 4 Bur. 2225, Sec. 138.
vs. Reddan, 123 Wis. 90, Sec. 101.
vs. Riley, 57 Neb. 252, Sec. 187.
Lower vs. Buchanan Bank, 78 Mo. 67, Sec. 114.
Lowman vs. Sheets, 124 Ind. 416, Sec. 25.
vs. Yates, 37 N. Y. 601, Sec. 82.
Lowry vs. Adams, 22 Vt. 160, Sec. 51.
vs. McKinney, 68 Pa. St. 294, Sec. 23, 90, 251.
vs. Polk County, 51 Iowa 50, Sec. 166.
vs. State, 64 Ind. 421, Sec. 174.
vs. Tew, 25 Hun 257, Sec. 189.
Luark vs. Malone, 34 Ind. 444, Sec. 41.
Lucas vs. Chamberlain, 8 B. Mon. (Ky.) 276, Sec. 34.
vs. Futrall, 84 Ark. 540, Sec. 145.
vs. Governor, 6 Ala. 826, Sec. 175.
vs. Owens, 113 Ind. 521, Sec. 108.
vs. White Star Line Transfer Co., 70 Iowa 541, Sec. 148.
Luce vs. Foster, 42 Neb. 818, Sec. 126, 128.
Ludlow vs. Simond, 2 Cal. 1, Sec. 17.
Ludwick vs. Watson, 3 Oreg. 256, Sec. 16.
Luling Oil & Mfg. Co. vs. Gohmert, 50 Tex. Civ. App. 606, Sec. 76-a.
Lumber Co. vs. Buchtel, 101 U. S. 638, Sec. 108.
vs. Gillard, 136 Cal. 55, Sec. 76-a.
vs. National Surety Co., 124 Iowa 617, Sec. 76-a.
vs. Peterson, 124 Iowa 550, Sec. 76-a, 76-b.
Lumberman's Nat. Bank vs. Campbell, 61 Oregon 123, Sec. 8.
Lumpkin vs. Mills, 4 Ga. 343, Sec. 247, 249.
Lumsden vs. Leonard, 55 Ga. 374, Sec. 100.
Lund vs. Hennessey, 67 Ill. App. 233, Sec. 168.
Lunsford vs. Baskins, 6 Ala. 512, Sec. 188.
Lusk vs. Throop, 189 Ill. 127, Sec. 36.
Lutt vs. Sterrett, 26 Kan. 561, Sec. 185.
Lux vs. McLeod, 19 Col. 465, Sec. 191.
Lyman vs. City of Lincoln, 38 Neb. 794, Sec. 131.
vs. Sherwood, 20 Vt. 42, Sec. 78.
Lynch vs. Hancock, 14 S. C. 66, Sec. 245.

(References are to sections.)

- Lyon vs. Crissman, 22 N. C. 268, Sec. 46.
 vs. Hersey, 32 Hun 253, Sec. 197.
 vs. Osgood, 58 Vt. 707, Sec. 218.
 vs. Plum, 75 N. J. Law, 882, Sec. 53.
 Lyons vs. Nat. Surety Co., 243 Mo. 607, Sec. 241.

M

- Mace vs. Wells, 7 How. 272, Sec. 284.
 Macfie vs. Kilanea, 6 Hawaiian 440, Sec. 281.
 Machado vs. Fernandez, 74 Cal. 362, Sec. 275.
 Machin vs. Prudential Trust Co., 210 Pa. 253, Sec. 105.
 Macey vs. Childress, 2 Tenn. Ch. 438, Sec. 46.
 Macon & B. R. R. Co. vs. Gibson, 85 Ga. 1, Sec. 192.
 Mack vs. Jackson, 9 Col. 536, Sec. 196.
 Macklin vs. Northern Bank of Ky., 83 Ky. 314, Sec. 255.
 Mackenzie vs. Edinburg School Trustees, 72 Ind. 189, Sec. 125.
 MacDonald vs. Longbotton, 1 El. & El. 977, Sec. 49.
 Madison Co. vs. Johnston, 51 Iowa 152, Sec. 224.
 Magee vs. Leggett, 48 Miss. 139, Sec. 245.
 Magner vs. Knowles, 67 Ill. 325, Sec. 174.
 Magruder vs. Marshall, 1 Blackford 333, Sec. 211.
 Maguire vs. Pan American Amusement Co., 205 Mass. 64, Sec. 214.
 Maher vs. Lanfrom, 86 Ill. 513, Sec. 83.
 Mahurin vs. Pearson & Bellows, 8 N. H. 539, Sec. 117.
 Malling Union vs. Graham, 5 L. R. C. P. 201, Sec. 152.
 Maingray vs. Lewis, 3 Ir. R. C. L. 495, Sec. 23.
 Mallan vs. May, 13 M. & W. 511, Sec. 49.
 Mallers vs. Crane Co., 92 Ill. App. 514, Sec. 123.
 Malone vs. Keener, 44 Pa. 107, Sec. 42.
 vs. McClain, 3 Ind. 532, Sec. 185.
 vs. Philadelphia, 147 Pa. 416, Sec. 135.
 Mallory vs. Gillett, 21 N. Y. 412, Sec. 39, 41.
 Malleable Iron Range Co. vs. Pusey, 244 Ill. 184, Sec. 60.
 Mamerow vs. National Lead Co., 206 Ill. 626, Sec. 49, 59, 68, 71.
 Manchester Co. vs. Sweeting, 10 Wend. 162, Sec. 116.
 Mandeville vs. Reynolds, 68 N. Y. 528, Sec. 173.
 Mankin vs. Jones, 68 W. Va. 422, Sec. 39.
 vs. Ludowici-Celadon Co., 215 U. S. 533, Sec. 131.
 Manhattan Gas Light Co. vs. Ely, 39 Barb. 174, Sec. 54.
 Manhattan Life Ins. Co. vs. Alexander, 89 Hun 449, Sec. 122.
 Manhattan Rolling Mill vs. Dellon, 113 N. Y. S. 571, Sec. 50, 55.
 Mann vs. Yazoo City, 31 Miss. 574, Sec. 174.
 Manlove vs. Vick, 55 Miss. 567, Sec. 192.
 Manor Nat. Bank vs. Lowery, 242 Pa. 559, Sec. 11.
 Manning vs. Alger, 85 Iowa 617, Sec. 85.
 vs. Gould, 90 N. Y. 476, Sec. 181.
 vs. Manning, 26 Kan. 98, Sec. 214.
 vs. Mills, 12 Up. Can. (Q. B.) 515, Sec. 51.

(References are to sections.)

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 Manufacturers Bank vs. Cole, 39 Me. 188, Sec. 78.
 Manufacturers Nat. Bank vs. Dickerson, 41 N. J. L. 448, Sec. 132.
 Manufacturers & Traders Bank vs. Dare, 67 Hun 44, Sec. 193.
 Mansfield vs. Edwards, 136 Mass. 15, Sec. 265..
 Mareey vs. Crawford, 16 Conn. 549, Sec. 32.
 March vs. Allabough, 103 Pa. 335, Sec. 135.
 Marchand vs. Frellsen, 105 U. S. 423, Sec. 188.
 Marchman vs. Robertson, 77 Ga. 40, Sec. 105.
 Mark vs. Hyatt, 135 N. Y. 306, Sec. 192.
 Marks vs. First Nat. Bank, 79 Ala. 550, Sec. 74, 108.
 vs. Massachusetts Bonding & Ins. Co., 117 N. Y. S. 1019, Sec. 208.
 Markland Mining & Mfg. Co. vs. Kimmel, 87 Ind. 560, Sec. 6, 50, 127.
 Marsh vs. Cohen, 68 N. C. 283, Sec. 181.
 vs. Day, 18 Pick. 321, Sec. 63.
 vs. Griffin, 42 Iowa 403, Sec. 20.
 vs. Harrington, 18 Vt. 150, Sec. 271.
 vs. Pike, 10 Paige Ch. 595, Sec. 251.
 Marshall vs. Hudson, Admr., 9 Yerg. (Tenn.) 57, Sec. 284.
 vs. Marshall, 42 Ala. 149, Sec. 85.
 Marlow vs. Pitfield, 1 P. Wms. 558, Sec. 259.
 Marney vs. State, 13 Mo. 7, Sec. 152.
 Marree vs. Ingle, 69 Ark. 126, Sec. 76-b.
 Marston vs. Swett, 66 N. Y. 206, Sec. 45, 46.
 Marquis of Downshire vs. Lady Sandys, 6 Ves. Jr. 107, Sec. 179.
 Marmaduke vs. People, 45 Col. 357, Sec. 231.
 Martin vs. Black, 20 Ala. 309, Sec. 57.
 vs. Campbell, 120 Mass. 126, Sec. 108.
 vs. Croker, 62 Iowa 328, Sec. 191.
 vs. Ellerbe's Admr., 70 Ala. 326, Sec. 273, 279, 280, 282.
 vs. Frantz, 127 Pa. 389, Sec. 276.
 vs. Mechanics Bank, 6 Har. & John. 235, Sec. 101.
 vs. Skehan, 2 Col. 614, Sec. 116.
 vs. State, 145 S. W. 916, Sec. 231.
 vs. Tally, 72 Ala. 23, Sec. 221.
 vs. Thomas, 24 How. 315, Sec. 79, 215.
 vs. Whites, 128 Mo. App. 117, Sec. 17.
 vs. Wright, 6 Ad. & Ell. N. S. 917, Sec. 50.
 Martindale vs. Brock, 41 Md. 571, Sec. 282.
 Martyn vs. Lamar, 75 Iowa 235, Sec. 67.
 Marx vs. Leinkauff, 93 Ala. 453, Sec. 208.
 Mason vs. Alexander, 44 O. S. 318, Sec. 180.
 vs. Bogg, 2 Mylne & C. 443, 448, Sec. 252.
 vs. Hall, 30 Ala. 599, Sec. 43.
 vs. Nichols, 22 Wis. 376, Sec. 104.
 vs. Pierron, 69 Wis. 585, Sec. 169.
 vs. Pritchard, 12 East. 227, Sec. 18, 59.

(References are to sections.)

- Mason vs. Richards, 12 Iowa 73, Sec. 213.
 vs. Terrell, 3 Ga. App. 348, Sec. 231.
- Massey vs. Brown, 4 S. C. 85, Sec. 114.
 vs. Turner, 2 Houst. (Del.) 79, Sec. 8.
- Massie vs. Mann, 17 Iowa 131, Sec. 245.
- Masser vs. Strickland, 17 Serg. & R. 354, Sec. 177.
- Mathews vs. Aikin, 1 N. Y. 595, Sec. 244, 262.
 vs. Garman, 110 Mich. 559, Sec. 78.
 vs. Phelps, 61 Mich. 327, Sec. 50, 59.
 vs. Saurin, L. R. 31 Ir. 181, Sec. 281.
 vs. Switzler, 46 Mo. 301, Sec. 96.
- Matthews vs. Densmore, 109 U. S. 216, Sec. 172.
 vs. Hall, 21 W. Va. 510, Sec. 283.
 vs. Towell, 138 S. W. 169, Sec. 45.
- Mathis vs. Morgan, 72 Ga. 517, Sec. 109.
- Matson vs. Wharam, 2 T. R. 80, Sec. 36.
- Matteson vs. Ellsworth, 33 Wis. 488, Sec. 74.
- Mattoon vs. Cowing, 79 Mass. 387, Sec. 224.
- Mather vs. People, 12 Ill. 9, Sec. 232.
- Mattingly vs. Sutton, 19 W. Va. 19, Sec. 281.
- Maure vs. Harrison, 1 Eq. Cases, Abridgment 93, Placitum 5, Sec. 256.
- Mauran vs. Bullus, 16 Pet. 528, Sec. 49.
- Maxey vs. Carter, 10 Yerg. (Tenn.) 521, Sec. 261.
- May vs. Ball, 21 Ky. L. Rep. 1673, Sec. 285.
 vs. May, 19 Fla. 373, Sec. 19.
 vs. Williams, 61 Miss. 125, Sec. 34.
- Mayes vs. Lane, 116 Ky. 566, Sec. 76-b.
- Mayer vs. Duke, 72 Tex. 445, Sec. 200.
- Mayberry vs. Bainton, 2 Harr. (Del.) 24, Sec. 67.
- Mayo vs. Hutchinson, 57 Me. 546, Sec. 11.
 vs. Williams, 17 O. 244, Sec. 187.
- Mayor of East Lake vs. DeVore, 169 Ala. 237, Sec. 193.
- Mayott vs. Knott, 16 Wyo. 108, Sec. 187.
- Mays vs. Cockrum, 57 Tex. 352, Sec. 119.
 vs. Joseph, 34 O. S. 22, Sec. 32, 139.
- Mayhew vs. Crickett, 2 Swanst. 185, Sec. 98, 244.
- McAllister vs. Pitts, 58 Neb. 424, Sec. 113.
- McArdle vs. McDaniel, 75 Ga. 270, Sec. 231.
- McAreavy vs. Magirl, 123 Iowa 605, Sec. 23, 90.
- McBride vs. Potter-Lovell Co., 169 Mass. 7, Sec. 266.
- McCalla vs. Patterson, 57 Ky. 201, Sec. 220.
- McCallian vs. Hibernia Sav. Soc., 83 Cal. 571, Sec. 185.
- McCanna & Fraser Co. vs. Citizens Trust & Sur. Co., 74 Fed. Rep. 597.
 (Sec. 243, 279.)
- McCarthy vs. Chimney Construction Co., 219 Ill. 616, Sec. 190.
 vs. Holden, 54 Kan. 313, Sec. 191.

(References are to sections.)

- McCarty vs. Frazer, 62 Mo. 263, Sec. 218.
 vs. Roots, 21 How. 432, Sec. 264.
 McCartney vs. Shepard, 21 Mo. 573, Sec. 139.
 McCasland vs. Doorley, 47 Ill. App. 513, Sec. 43.
 McCanghey vs. Jacoby, 54 O. S. 487, Sec. 218.
 vs. Smith, 27 N. Y. 30, Sec. 75.
 McCelvey vs. Noble, 12 Rich. L. 167, Sec. 10.
 McChord vs. Fisher, 52 Ky. 193, Sec. 222.
 McClaskey vs. Barr, 79 Fed. Rep. 408, Sec. 71.
 McClatchie vs. Durham, 44 Mich. 435, Sec. 285.
 McClendon vs. Wells, 20 S. C. 514, Sec. 200.
 McClenny vs. Inverarity, 80 Kas. 569, Sec. 164.
 McClure vs. Andrews, 68 Ind. 97, Sec. 259.
 McClurg vs. Fryer, 15 Pa. 293, Sec. 63.
 McCollum vs. Cushing, 22 Ark. 540, Sec. 66, 67.
 McComb vs. Kittridge, 14 O. 348, Sec. 83.
 McCulloch vs. McKee, 16 Pa. 289, Sec. 128.
 McConnell vs. Brillhart, 17 Ill. 354, Sec. 30.
 vs. Poor, 113 Iowa 133, Sec. 76-a.
 McConnon & Co. vs. Evans, 152 Ky. 491, Sec. 74.
 vs. Laursen, 22 N. D. 604, Sec. 65, 66, 67.
 McCormick vs. Bay City, 23 Mich. 457, Sec. 15, 20.
 vs. Irwin, 35 Pa. 111, Sec. 244, 254.
 McCormick Co. vs. McKee, 51 Mich. 426, Sec. 109.
 McCormick vs. Thatcher, 8 Utah 294, Sec. 145.
 McCoy vs. Jack, 47 W. Va. 201, Sec. 90.
 vs. State, 37 Tex. 219, Sec. 231.
 McCracken vs. German Fire Insurance Co., 43 Md. 471, Sec. 255.
 vs. Todd, 1 Kas. 148, Sec. 21.
 McCready vs. Van Antwerp, 24 Hun 322, Sec. 251.
 McCreary vs. Rodgers, 35 Ark. 298, Sec. 180.
 vs. Van Hook, 35 Tex. 631, Sec. 39.
 McDaniel vs. Gardner, 34 La. Ann. 341, Sec. 204.
 McDonald vs. Loewen, 145 Mo. App. 49, Sec. 70.
 vs. Magruder, 3 Pet. 470, Sec. 264, 278.
 vs. State of Ill., 222 Ill. 325, Sec. 221.
 vs. Whitfield, 27 Can. (S. C.) 94, Sec. 114.
 McDonald Mfg. Co. vs. Moran, 52 Wis. 203, Sec. 258.
 McDonald, In re, 14 N. B. R. 477, Sec. 100.
 McDougald vs. Argonaut Land, etc., Co., 117 Cal. 87, Sec. 57.
 McDougall vs. Walling, 21 Wash. 478, Sec. 89.
 MacDowell vs. Bank, 1 Harringt. 369, Sec. 101.
 vs. Burwell, 4 Rand (Va.) 317, Sec. 175.
 vs. Laev, 35 Wis. 171, Sec. 142.
 McEwen vs. Fletcher, 146 N. W. 1, Sec. 118.
 McFarlane vs. Howell, 91 Tex. 218, Sec. 185.
 vs. Wadhams, 165 Fed. 987, Sec. 65, 66.

(References are to sections.)

- McGee vs. Connor, 1 Utah 92, Sec. 10.
 McGovern vs. Rectanus, 139 Ky. 365, Sec. 178.
 McGowan Commercial Co. vs. Midland Coal Co., 41 Mont. 211, Sec. 36.
 McGrath vs. Clark, 56 N. Y. 34, Sec. 72, 74.
 vs. Carnegie Trust Co., 221 N. Y. 92, Sec. 245.
 McGuire vs. Com., 7 Ky. L. Rep. 287, Sec. 231.
 vs. Gerstley, 204 U. S. 489, Sec. 128.
 McGurk vs. Huggett, 56 Mich. 187, Sec. 278.
 McHardy vs. Wadsworth, 8 Mich. 349, Sec. 117.
 McIntosh-Huntington Co. vs. Reed, 89 Fed. Rep. 464, Sec. 6.
 McIntyre vs. Parker, 195 Mass. 155, Sec. 217.
 McKaughan vs. Baldwin, 153 S. W. 660, Sec. 93.
 McKee vs. Campbell, 27 Mich. 497, Sec. 267, 271.
 vs. Griffin, 60 Ala. 427, Sec. 144.
 vs. Hamilton, 33 O. S. 7, Sec. 279.
 vs. Needles, 123 Idaho 195, Sec. 67.
 McKeeby vs. Webster, 170 Pa. 624, Sec. 114.
 McKellar vs. Peck, 39 Texas 381, Sec. 181.
 McKecknie vs. Ward, 58 N. Y. 541, Sec. 107.
 McKenzie vs. Barrett, 43 Texas Civ. App. 451, Sec. 76-b.
 vs. Jackson, 4 Ala. 230, Sec. 40.
 McKey vs. Lauffin, 48 Kan. 581, Sec. 212.
 McKim vs. Bartlett, 129 Mass. 226, Sec. 217.
 vs. Glover, 161 Mass. 418, Sec. 178.
 vs. Blake, 139 Mass. 593, Sec. 174.
 McKnight vs. Bradley, 10 Rich. E. Q. (S. C.) 557, Sec. 281.
 vs. Lange Mfg. Co., 155 S. W. 977, Sec. 76-b.
 McLain vs. Simington, 37 O. S. 484, Sec. 20.
 McLaughlin vs. McGovern, 34 Barb. 208, Sec. 104.
 McLean vs. Towle, 3 Sand. Ch. 117, Sec. 250.
 McLendon vs. State, 92 Tenn. 520, Sec. 164.
 McLennan vs. Wellington, 48 Kansas 756, Sec. 76-a.
 McLeod vs. State, 69 Miss. 221, Sec. 149.
 McLuckie vs. Williams, 68 Md. 262, Sec. 198.
 McMahan vs. Webb, 52 Miss. 424, Sec. 143.
 McMicken vs. Comm., 58 Pa. 213, Sec. 177.
 vs. Safford, 197 Ill. 540, Sec. 57.
 McMillan vs. Baker, 20 Kansas 50, Sec. 212.
 vs. Dana, 18 Cal. 339, Sec. 202, 205.
 McMullen vs. Hinkle, 39 Miss. 142, Sec. 99.
 vs. United States, 222 U. S. 460, Sec. 76-a.
 vs. United States, 167 Fed. 460, Sec. 17.
 vs. Winfield Bldg. & Loan Assn., 64 Kas. 298, Sec. 70.
 McMurray vs. Noyes, 72 N. Y. 523, Sec. 62.
 McNairy vs. Eastland, 10 Yerg. (Tenn.) 310, Sec. 249.
 McNally vs. Mercantile Trust Co., 204 Pa. 596, Sec. 76-b.
 McNaught vs. McClaghry, 42 N. Y. 22, Sec. 16.
 McNeil vs. Miller, 29 W. Va. 480, Sec. 259.
 McPherson vs. Meck, 30 Mo. 345, Sec. 279.
 McRaven vs. Crisler, 53 Miss. 542, Sec. 73.
 McQuewans vs. Hamlin, 35 Pa. St. 517, Sec. 11.

(References are to sections.)

- McShane vs. Howard Bank, 73 Md. 135, Sec. 130, 174.
 McTeer vs. Lebow, 85 Tenn. 121, Sec. 169.
 McVicar vs. Royce, 17 Up. Can. (Q. B.) 529, Sec. 282.
 McWhorter vs. McMahan, 10 Paige 386, Sec. 22.
 McCrillis vs. How, 3 N. H. 348, Sec. 97.
 Mead vs. Merrill, 30 N. H. 472, Sec. 105.
 vs. Parker, 111 N. Y. 259, Sec. 63.
 vs. White, 53 Wash. 638, Sec. 29.
 Meador vs. Meador, 88 Ky. 217, Sec. 281.
 Mears vs. Commonwealth, 8 Watts (Pa.) 223, Sec. 21.
 Meaux vs. Pittman, 35 La. Ann. 360, Sec. 197.
 Mechanics & Trader's Bank vs. Seitz, 150 Pa. 632, Sec. 101.
 vs. Wright, 53 Mo. 153, Sec. 112.
 Mechlenburg County vs. Beales, 111 Va. 691, Sec. 166.
 M. E. Church of Franklin vs. Equitable Surety Co., 269 Pa. 411, Sec. 238.
 Medlin vs. Comm., 74 Ky. 605, Sec. 232.
 Meek vs. Frantz, 171 Pa. 632, Sec. 15.
 Meggett vs. Baum, 57 Miss. 22, Sec. 81.
 Megrath vs. Gray, L. R., 9 C. P. 216, Sec. 100.
 Meinhard vs. Youngblood, 37 S. C. 223, Sec. 192.
 Meiswinkle vs. Jung, 30 Wis. 361, Sec. 83.
 Melendy vs. Keen, 89 Ill. 395, Sec. 255.
 Mellendy vs. Austin, 69 Ill. 15, Sec. 118.
 Melms vs. Werdehoff, 14 Wis. 18, Sec. 264.
 Menard vs. Scudder, 7 La. Ann. 385, Sec. 18.
 Menifee vs. Clark, 35 Ind. 304, Sec. 84.
 Mercantile Ins. Co. vs. Clark, 118 Mass. 288, Sec. 248.
 Merchants Ins. Co. vs. Hanck, 83 Mo. 21, Sec. 83.
 vs. Herber, 68 Minn. 420, Sec. 96.
 Merchants Bank vs. Honey, 58 Kas. 603, Sec. 124.
 Merchants Nat. Bank vs. Abernathy, 32 Mo. App. 211, Sec. 255.
 vs. Cole, 83 O. S. 50, Sec. 49, 50.
 vs. Smith, 59 Mont. 280, Sec. 8.
 vs. State Bank, 93 Iowa 650, Sec. 48.
 Meriden Britannia Co. vs. Zingsen, 48 N. Y. 247, Sec. 38.
 Meriden Silver Plate Co. vs. Flory, 44 O. S. 430, Sec. 115.
 Merle vs. Wells, 2 Camp. 413, Sec. 59.
 Merrells vs. Phelps, 34 Conn. 109, Sec. 227.
 Merriken vs. Godwin, 2 Del. Ch. 236, Sec. 247.
 Merrill vs. National Bank of Jacksonville, 173 U. S. 131, Sec. 252.
 Merrimaek Co. Bank vs. Brown, 12 N. H. 320, Sec. 94.
 Merriman vs. Barker, 121 Ind. 74, Sec. 86.
 Merritt vs. Haas, 106 Minn. 275, Sec. 95.
 Mersman vs. Werges, 112 U. S. 139, Sec. 75.
 Meserve vs. Clark, 115 Ill. 580, Sec. 181, 190, 201.
 Metcalf vs. Young, 43 Ala. 643, Sec. 204.
 Metrovich vs. Jovovich, 58 Cal. 341, Sec. 206.
 Metz vs. The People, 6 Col. App. 57, Sec. 144.
 Metzner vs. Baldwin, 11 Minn. 150, Sec. 112.
 Metropolitan Exhibition Co. vs. Ewing, 42 Fed. Rep. 198, Sec. 49.

(References are to sections.)

- Metropolitan Life Ins. Co. vs. Bender, 124 N. Y. 47, Sec. 134.
 Metropolitan Washing Machine Co. vs. Morris, 39 Vt. 393, Sec. 71.
 Meyer vs. Fagan, 34 Neb. 184, Sec. 208.
 vs. Hartman, 72 Ill. 442, Sec. 31, 40.
 vs. Ruhstadt, 66 Ill. App. 346, Sec. 66.
 Meyers vs. Block, 120 U. S. 206, Sec. 182.
 vs. Campbell, 59 N. J. L. 378, Sec. 255.
 Meysenburg vs. Schlieper, 48 Mo. 426, Sec. 196.
 Miami Co. Nat. Bank vs. Goldberg, 133 Wis. 175, Sec. 58, 66.
 Michael vs. St. L. M. F. Ins. Co., 17 Mo. App. 23, Sec. 49.
 Michie vs. Ellair, 60 Mich. 73, Sec. 188.
 Michigan State Bank vs. Leavenworth Est., 28 Vt. 209, Sec. 71.
 Michigan State Ins. Co. vs. Soule, 51 Mich. 312, Sec. 113.
 Michlewait vs. Noel, 69 Iowa 344, Sec. 109.
 Middleboro Nat. Bank vs. Richards, 55 Neb. 682, Sec. 23-a.
 Middlesex Mfg. Co. vs. Lawrence, 83 Mass. 339, Sec. 129.
 Middle States L. B. & C. Co. vs. Engle, 45 W. Va. 588, Sec. 63.
 Midgett vs. Vann, 158 N. C. 128, Sec. 197.
 Mifflin's Appeal, 98 Pa. 150, Sec. 255.
 Miles vs. Linnell, 97 Mass. 298, Sec. 63.
 Miller vs. Bagwell, 3 McCord (S. C.) 429, Sec. 126.
 vs. Donovan, 13 Idaho 735, Sec. 197.
 vs. Dunlap, 22 Mo. App. 97, Sec. 49.
 vs. Dyer, 1 Duv. (Ky.) 263, Sec. 100.
 vs. Eccles, 155 Pa. 36, Sec. 76.
 vs. Fichthorn, 31 Pa. 252, Sec. 126.
 vs. Finley, 26 Mich. 249, Sec. 75.
 vs. Gaskins, Sm. & M. Ch. (Miss.) 524, Sec. 103.
 vs. Grice, 2 Rich. Law (S. C.) 27, Sec. 168.
 vs. Irvine, 1 Dev. & Bat. Law (N. C.) 103, Sec. 27.
 vs. Kennedy, 12 S. D. 478, Sec. 90.
 vs. Kingsbury, 28 Ill. App. 332, Sec. 142.
 vs. Lewiston Nat. Bank, 18 Idaho 124, Sec. 67, 68.
 vs. Matthews, 87 Md. 464, Sec. 13.
 vs. Moore, 3 Humph. (Tenn.) 189, Sec. 158.
 vs. Parker, 73 N. C. 58, Sec. 192.
 vs. Rhoades, 20 O. S. 494, Sec. 139.
 vs. Ridgely, 22 Fed. Rep. 889, Sec. 111.
 vs. Spain, 41 O. S. 376, Sec. 94.
 vs. State, 158 Ala. 73, Sec. 232.
 vs. Stem, 2 Pa. 286, Sec. 84.
 vs. Stewart, 9 Wheat. 680, Sec. 2, 50, 76, 151, 153.
 vs. Stout, 5 Del. Ch. 259, Sec. 115.
 vs. Vaughn, 78 Ala. 323, Sec. 188.
 Miller-Jones Furniture Co. vs. Fort Smith Ice Co., 66 Ark. 287, Sec. 76-a.
 Miller's Appeal, 35 Pa. St. 481, Sec. 252.
 Miller's Estate, 82 Pa. St. 113, Sec. 252.

(References are to sections.)

- Millett vs. Parker, 2 Met. (Ky.) 608, Sec. 74.
 Milroy vs. Quinn, 69 Ind. 406, Sec. 6, 61, 68.
 Mills vs. Allen, 7 Jones L. (N. C.) 564, Sec. 163.
 vs. Brown, 11 Iowa 314, Sec. 34.
 vs. Gleason, 21 Cal. 274, Sec. 212.
 vs. Todd, 83 Ind. 25, Sec. 93.
 Mills-Carleton Co. vs. Huberty, 84 O. S. 81, Sec. 49.
 Milton vs. De Yampert, 3 Ala. 648, Sec. 10.
 Minick vs. Huff, 41 Neb. 516, Sec. 34, 280.
 Minor vs. Woodward, 179 Mo. App. 333, Sec. 18.
 Mississippi Val. Trust Co. vs. Somerville, 85 Mo. App. 265, Sec. 188.
 Mitchell vs. Burton, 2 Head (Tenn.) 613, Sec. 151.
 vs. Hawley, 79 Cal. 301, Sec. 214.
 vs. Hydraulic Stone Co., 129 S. W. 148.
 vs. Railton, 45 Mo. App. 273, Sec. 52, 65.
 vs. Sullivan, 30 Kas. 231, Sec. 193.
 vs. Vance, 5 T. B. Mon. (Ky.) 528, Sec. 126.
 Mitchell Grain & S. Co. vs. Maryland Casualty Co., 108 Kan. 379, Sec. 130.
 Mitts vs. McMorran, 64 Mich. 664, Sec. 40.
 Mix vs. People, 86 Ill. 329, Sec. 187, 201.
 Mize vs. Mashburn, 8 Ga. App. 408, Sec. 31.
 Mobile Life Ins. Co. vs. Randall, 71 Ala. 220, Sec. 85.
 Mobile & Girard R. R. Co. vs. Jones, 57 Ga. 198, Sec. 42.
 Mobile & Montgomery Ry. vs. Brewer, 76 Ala. 135, Sec. 81.
 Modawell vs. Hudson, 80 Ala. 265, Sec. 219.
 Moffat vs. Greenwalt, 90 Cal. 368, Sec. 181.
 Moffitt vs. Garrett, 23 Okl. 398, Sec. 202.
 Moies vs. Bird, 11 Mass. 436, Sec. 9.
 Moloney vs. Nelson, 158 N. Y. 351, Sec. 279.
 Monro vs. Nat. Surety Co., 47 Wash. 488, Sec. 76-b.
 Monteith vs. Commonwealth, 15 Gratt. 172, Sec. 19.
 Montefiore vs. Lloyd, 15 J. Scott (N.S.) 203, Sec. 53.
 Montgomery vs. Dillingham, 11 Miss. 647, Sec. 174.
 vs. Hamilton, 43 Ind. 451, Sec. 94.
 vs. Hughes, 65 Ala. 201, Sec. 153.
 Montgomery Railroad vs. Hurst, 9 Ala. 513, Sec. 75.
 Monson vs. Drakelly, 40 Conn. 552, Sec. 254.
 Monmouth Park Assn. vs. Wallis Iron Works, 55 N. J. L. 132, Sec. 135.
 Moore vs. Beech Co., 221 Ill. App. 609, Sec. 214.
 vs. Boudinot, 64 N. C. 190, Sec. 158.
 vs. Bruner, 31 Ill. App. 400, Sec. 272.
 vs. Eisaman, 201 Pa. 190, Sec. 27.
 vs. Eure, 101 N. C. 11, Sec. 166.
 vs. Fitz, 59 N. H. 572, Sec. 85.
 vs. Gray, 26 O. S. 525, Sec. 95.
 vs. Holt, 10 Gratt. (Va.) 284, Sec. 50, 58.
 vs. House, 64 Ill. 162, Sec. 142.
 vs. Huntington, 84 U. S. 417, Sec. 187.
 vs. Lachmund, 59 Ore. 565, Sec. 195.
 vs. Lassiter, 16 Lea (Tenn.) 630, Sec. 189, 254.

(References are to sections.)

- Moore** vs. McKenney, 83 Me. 80, Sec. 57.
 vs. McKinley, 60 Iowa 367, Sec. 121.
 vs. Paine, 12 Wend. 123, Sec. 102.
 vs. Redding, 69 Miss. 841, Sec. 83.
 vs. State, 106 S. W. 358, Sec. 232.
 vs. Stevens, 60 Miss. 809, Sec. 279.
 vs. Title Guaranty & Trust Co., 151 Mo. App. 256, Sec. 17.
 vs. Topliff, 107 Ill. 241, Sec. 115.
 vs. Withenberg, 13 La. Ann. 22, Sec. ——.
- Moorer** vs. Andrews, 39 S. C. 427, Sec. 196.
- Moormann** vs. Voss, 77 Ohio 270, Sec. 115.
- Mooney** vs. Miller, 102 Mass. 217, Sec. 110.
- Moran** vs. Abbey, 63 Cal. 56, Sec. 259.
- Morbeck** vs. State, 28 Ind. 86, Sec. 167.
- Morean** vs. Stanley, 34 Col. 91, Sec. 188.
- Morehead** vs. Citizens Deposit Bank, 113 S. W. 501, Sec. 91-a.
- Morgan** vs. Boyer, 39 O. S. 324, Sec. 18, 59.
 vs. Commonwealth, 12 Bush. (Ky.) 84, Sec. 228.
 vs. Hale, 12 W. Va. 713, Sec. 139.
 vs. Hall & Lyon, 34 R. I. 273, Sec. 11.
 vs. Salmon, 135 Pac. 553, Sec. 125.
 vs. Smith, 70 N. Y. 537, Sec. 92, 114, 269.
 vs. Thompson, 60 Iowa 280, Sec. 84.
- Morley** vs. Boothby, 3 Bing. 107, Sec. 26.
 vs. Metamora, 78 Ill. 394, Sec. 156, 174.
- Mortlock** vs. Buller, 10 Ves. 292, Sec. 22.
- Morton** vs. Dean, 13 Met. 385, Sec. 29.
- Moriarity** vs. Bagnetto, 110 La. 598, Sec. 94.
- Morris** vs. Cooper, 35 Kan. 156, Sec. 224.
 vs. Kniffin, 37 Barb. 336, Sec. 30.
 vs. State, 47 Tex. 583, Sec. 163.
 vs. Wadsworth, 17 Wend. 103, Sec. 68.
- Morris Canal & Banking Co.** vs. Van Vorst, 21 N. J. L. 100, Sec. 140.
- Morrison** vs. Arons, 65 Minn. 321, Sec. 76, 77, 107.
 vs. Citizens Nat. Bank, 65 N. H. 253, Sec. 96, 115.
 vs. Poyntz, 7 Dana (Ky.) 307, Sec. 269.
 vs. Taylor, 21 Ala. 779, Sec. 274.
 vs. Yancey, 23 Mo. App. 670, Sec. 214.
- Morrell** vs. Cowan, L. R., 7 Ch. Div. 151, Sec. 55.
- Morse** vs. Blanchard, 117 Mich. 37, Sec. 83.
 vs. Hovey, 9 Paige 197, Sec. 103.
 vs. Huntington, 40 Vt. 488, Sec. 86, 92.
- Morrow** vs. U. S. Mortgage Co., 96 Ind. 21, Sec. 260.
- Moseley** vs. Fullerton, 59 Mo. App. 143, Sec. 274, 286.
- Moss** vs. Cohen, 36 N. Y. S. 265, Sec. 138.
 vs. Pettingill, 3 Minn. 217, Sec. 98.
 vs. Riddle, 5 Cranch 351, Sec. 111, 127.
 vs. State, 10 Mo. 338, Sec. 153.

(References are to sections.)

- Moses vs. Ranlet, 2 N. H. 488, Sec. 252.
 vs. United States, 166 U. S. 571, Sec. 176.
- Mott Iron Works vs. Clark, 69 S. E. 227, Sec. 66.
- Moulton vs. Posten, 52 Wis. 169, Sec. 83, 84.
- Mound vs. Barker, 71 Vt. 253, Sec. 103.
- Moye vs. Herndon, 30 Miss. 110, Sec. 74.
- Moynahan vs. Hannaford, 42 Mich. 329, Sec. 8, 10.
- Mudd vs. Comm., 14 Ky. L. Rep. 672, Sec. 231.
 vs. Shroader, 152 Ky. 696, Sec. 72.
- Mudge vs. Varner, 146 N. C. 147, Sec. 49, 57.
- Mueller vs. Barge, 54 Minn. 314, Sec. 274.
 vs. Dobschuetz, 89 Ill. 176, Sec. 22, 102.
 vs. Kelley, 8 Col. App. 527, Sec. 181.
- Mulcrone vs. American Lumber Co., 55 Mich. 622, Sec. 38.
- Mullaly vs. Holden, 123 Mass. 583, Sec. 45.
- Muller vs. Fern, 35 Iowa 420, Sec. 196.
- Mullen vs. Morris, 43 Neb. 596, Sec. 127.
 vs. Whitmore, 74 N. C. 477, Sec. 147.
- Mulford vs. Estudillo, 23 Cal. 94, Sec. 257.
- Mulkey vs. Templeton, 60 S. W. (Tex. Civ. App.) 439, Sec. 264.
- Mulcare vs. Welch, 160 Mass. 58, Sec. 136, 278.
- Muller vs. Rivierre, 59 Tex. 640, Sec. 39.
- Mullikin vs. State, 7 Blackf. (Ind.) 77, Sec. 153.
- Mumford vs. Memphis & C. Ry. Co., 70 Tenn. 393, Sec. 128.
- Mumper vs. Kelley, 43 Kan. 256, Sec. 142.
- Munster & Leinster Bank vs. France, 24 L. R. Ir. 82, Sec. 86.
- Munding vs. Michael, 10 O. C. C. 165, Sec. 213.
- Munroe vs. Mundy & Scott, 146 N. W. 819, Sec. 39.
- Municipal Council vs. Peters, 9 Up. Can. (C. P.) 205, Sec. 110.
- Municipal Court of Providence vs. Henry, 11 R. I. 563, Sec. 220.
- Murray vs. Graham, 29 Iowa 520, Sec. 74.
 vs. Marshall, 94 N. Y. 611, Sec. 90.
 vs. O'Brien, 56 Wash. 361, Sec. 244.
 vs. People, 49 Col. 109, Sec. 231.
- Murphy vs. Gage, 21 S. W. (Tex. Civ. App.) 396, Sec. 276.
 vs. Glass, L. R., 2 P. C. 408, Sec. 117, 258.
 vs. Hart, 122 App. Div. 548, Sec. 61.
 vs. Hubble, 2 Duv. (Ky.) 247, Sec. 111.
 vs. Montandon, 3 Idaho 325, Sec. 199.
 vs. Renkert, 59 Tenn. 397, Sec. 40.
 vs. Stell, 43 Tex. 123, Sec. 46.
- Murphey vs. Gates, 81 Wis. 370, Sec. 42.
- Murrell vs. Scott, 51 Tex. 520, Sec. 250.
- Murto vs. McKnight, 28 Ill. App. 238, Sec. 38.
- Murdock vs. Brooks, 38 Cal. 596, Sec. 181, 187.
- Mussey vs. Rayner, 22 Pick. 223, Sec. 50, 59, 66, 69.
- Musgrave vs. Dickson, 172 Pa. 629, Sec. 245.

(References are to sections.)

- Museum of Fine Arts vs. American Bonding Co., 211 Mass. 124, Sec. 76-b.
 Mutual Bldg. & Loan Assn. vs. McMullen, 1 Penny. (Pa.) 431, Sec. 129.
 Mutual Life Ins. Co. vs. Wilcox, 8 Biss. 197, Sec. 129.
 Mutual Loan & Bldg. Assn. vs. Miles, 16 Fla. 204, Sec. 129.
 Muzzy vs. Stattuck, 1 Denio (N. Y.) 233, Sec. 167.
 Myers vs. Bank, 79 Ill. 257, Sec. 83.
 vs. Farmers State Bank, 53 Neb. 824, Sec. 99.
 Myres vs. Yaple, 60 Mich. 339, Sec. 248.
 Mystic Workers vs. U. S. Fidelity & Guaranty Co., 151 Ill. App. 223, Sec. 17.

N

- Nally vs. Long, 56 Md. 567, Sec. 253, 260.
 Nanz vs. Oakley, 120 N. Y. 84, Sec. 223.
 Nash vs. Fugate, 24 Grat. 202, Sec. 111, 127.
 vs. People, 36 N. Y. 607, Sec. 169.
 Nason vs. Poor Directors, 126 Pa. 445, Sec. 169.
 National Bank vs. Baker, 58 Ill. App. 343, Sec. 185.
 vs. Bigler, 83 N. Y. 51, 64, Sec. 118, 255.
 vs. Cushing, 53 Vt. 321, Sec. 250, 261.
 vs. Gerke, 68 Md. 449, Sec. 17.
 vs. Murphy, 125 Iowa 607, Sec. 94.
 vs. Peck, 127 Mass. 298, Sec. 101.
 vs. Thomas, 220 Pa. 360, Sec. 59.
 National Bank of Commerce vs. Garn, 23 O. C. C. 447, Sec. 50, 59.
 vs. Gilvin, 152 S. W. 652, Sec. 113.
 vs. Rockefeller, 174 F. 22, Sec. 55, 58.
 vs. Schirm, 3 Cal. App. 696, Sec. 253.
 National Bank of Gloversville vs. Wells, 79 N. Y. 498, Sec. 11.
 National Bank of Newburgh vs. Smith, 66 N. Y. 271, Sec. 101, 257.
 National Bank of Peoria vs. Diefendorf, 90 Ill. 396, Sec. 52.
 National Eagle Bank vs. Hunt, 16 R. I. 148, Sec. 71, 119.
 National Exchange Bank vs. McElfresh, 37 S. E. Rep. (W. Va.) 541, Sec. 51.
 vs. Lester, 194 N. Y. 461, Sec. 74.
 vs. Silliman, 65 N. Y. 475, Sec. 250.
 National Loan & Bldg. Soc. vs. Lichtenwalner, 100 Pa. 100, Sec. 63.
 National Mechanics Banking Assn. vs. Conkling, 90 N. Y. 116, Sec. 2, 76, 132.
 National Park Bank vs. German, etc., 116 N. Y. 281, Sec. 148.
 vs. Koehler, 204 N. Y. 174, Sec. 85.
 National Surety Co. vs. Heimann, 103 N. E. 105, Sec. 225.
 vs. State Savings Bank, 156 Fed. 21, Sec. 248.
 vs. White, 21 Ga. App. 471, Sec. 246.
 Natchitoches vs. Redmond, 28 La. Ann. 274, Sec. 137.
 Neagle vs. Kelley, 146 Ill. 460, Sec. 43.
 Neal vs. Buffington, 42 W. Va. 327, Sec. 245, 281.
 Nebraska, L. & T. Co. vs. Lincoln, etc., R. R. Co., 53 Neb. 246, Sec. 180.
 Neely vs. Bee, 32 W. Va. 519, Sec. 253, 274.
 vs. Rood, 54 Mich. 134, Sec. 248.

(References are to sections.)

- Neff vs. Horner, 63 Pa. St. 327, Sec. 20.
 Neil vs. Board of Trustees, 31 O. S. 15, Sec. 144.
 vs. Morgan, 28 Ill. 524, Sec. 20.
 Neilson & Churchill vs. Fry, 16 O. S. 552, Sec. 262, 269.
 Neelson vs. Sanborne, 2 N. H. 413, Sec. 27.
 Neininger vs. State, 50 O. S. 394, Sec. 17, 232.
 Neiser vs. Thomas, 46 Mo. App. 47, Sec. 197.
 Nelson vs. Bostwick, 5 Hill 37, Sec. 68.
 vs. Boynton, 3 Met. 396, Sec. 41.
 vs. Donovan, 16 Mont. 85 Sec. 187.
 vs. First National Bank, 48 Ill. 36, Sec. 31, 42.
 vs. Howe Mach. Co., 10 Ky. L. Rep. 37, Sec. 127.
 vs. Webster, 72 Neb. 332, Sec. 249.
 Nelson Mfg. Co. vs. Shreve, 94 Mo. App. 518, Sec. 66.
 Nesbitt vs. Turner, 155 Pa. 429, Sec. 133.
 Nevill's Case, 6 Ch. 43, Sec. 102.
 Nevitt vs. Woodburn, 160 Ill. 203, Sec. 221.
 Newark vs. Stout, 52 N. J. 35, Sec. 107.
 Newark Coal Co. vs. Upson, 40 O. S. 17, Sec. 192.
 Newcomb vs. Gibson, 127 Mass. 396, Sec. 283.
 vs. Hale, 90 N. Y. 326, Sec. 113.
 vs. Kloeblen, 77 N. J. L. 791, Sec. 49, 59.
 vs. Raynor, 21 Wend. 108, Sec. 100.
 vs. Worster, 7 Allen 198, Sec. 182.
 Newman vs. King, 54 O. S. 273, Sec. 73, 74.
 Newport Probate Court vs. Hazard, 13 R. I. 3, Sec. 218.
 Newton vs. Bushong, 22 Gratt. 628, Sec. 166.
 vs. Hammond, 38 O. S. 430, Sec. 225.
 vs. Lee, 139 N. Y. 332, Sec. 117.
 vs. Pence, 10 Ind. App. 672, Sec. 272.
 New Bedford Institution for Savings vs. Hathaway, 134 Mass. 69, Sec. 252.
 New Brunswick Land Co. vs. Conbeare, 9 H. L. 711, Sec. 110.
 New England Co. vs. Randall, 42 La. Ann. 260, Sec. 99.
 New Haven vs. National Steam Economizer Co., 79 Conn. 482, Sec. 72, 76-h.
 New Haven, etc., Co. vs. Hayden, 119 Mass. 361, Sec. 69.
 New Haven Lumber Co. vs. Raymond, 76 Iowa 225, Sec. 203.
 New Home Sewing Machine Co. vs. Seago, 128 N. C. 158, Sec. 137.
 New J. Midland R. R. Co. vs. Wortendyke, 27 N. J. Eq. 658, Sec. 245.
 New London Bank vs. Lee, 11 Conn. 112, Sec. 255.
 New National Turnpike Co. vs. Dulaney, 86 Ky. 516, Sec. 197.
 New Orleans vs. Clark, 95 U. S. 644, Sec. 70.
 New Orleans, St. L. & C. Ry. Co. vs. Burke, 53 Miss. 200, Sec. 128.
 News-Times Pub. Co. vs. Doolittle, 51 Colo. 386, Sec. 6.
 New York vs. Clark, 82 N. Y. S. 855, Sec. 76.
 vs. New York Refrigerator Co., 82 Hun. 553, Sec. 125.
 N. Y. Life Ins. Co. vs. Casey, 178 N. Y. 381, Sec. 79, 83.
 vs. Hamlin, 100 Wis. 17, Sec. 142.
 Nilback vs. Champeny, 10 S. D. 165, Sec. 83.

(References are to sections.)

- Nicholas vs. Burch, 128 Ind. 324, Sec. 99.
 vs. Johnson, 10 Conn. 192, Sec. 29.
 vs. MacLean, 101 N. Y. 526, Sec. 145.
 vs. Palmer, 48 Wis. 110, Sec. 73.
- Nichols & Shepard Co. vs. Horstad, 27 S. D. 262, Sec. 181.
- Nicholson vs. Paget, 5 C. & P. 395, Sec. 18, 60.
- Nightingale vs. Meginnis, 34 N. J. L. 461, Sec. 83.
- Nilson vs. Jonesboro, 57 Ark. 168, Sec. 135.
- Nimocks vs. Welles, 42 Kan. 39, Sec. 197.
- Nixon vs. Beard, 111 Ind. 137, Sec. 269, 275.
- Noble vs. Arnold, 23 O. S. 264, Sec. 197.
 vs. Turner, 69 Md. 519, Sec. 261.
- Nockles vs. Eggspieller, 47 Iowa 400, Sec. 203.
- Nofsinger vs. Hartnett, 84 Mo. 549, Sec. 189.
- Noland vs. Wayne, 31 La. Ann. 401, Sec. 287.
- Noll vs. Smith, 68 Ind. 188, Sec. 188.
- Nonna vs. Conlan, 68 N. J. L. 88, Sec. 143.
- Norcross vs. Nunan, 61 Cal. 640, Sec. 172.
- Nordhaus vs. Petersen, 54 Iowa 68, Sec. 204.
- Norman vs. Jackson Fertilizer Co., 79 Miss. 747, Sec. 90.
- Norris vs. Mersereau, 74 Mich. 687, Sec. 176.
 vs. Pollard, 75 Ga. 358, Sec. 103.
- Norridgewock vs. Hale, 80 Me. 362, Sec. 153.
- North vs. La Flesh, 73 Wis. 520, Sec. 118.
- Northampton Nat. Bank vs. Wylie, 52 Hun 146, Sec. 208.
- Northern Bank of Ky. vs. Cooke, 13 Bush (Ky.) 340, Sec. 97.
 vs. Farmers Nat. Bank, 111 Ky. 350, Sec. 97.
- Northern State Bank vs. Bellamy, 19 N. D. 509, Sec. 6, 91-a.
- North Atchison Bank vs. Gay, 114 Mo. 203, Sec. 109.
- North British Ins. Co. vs. Lloyd, 10 Excq. 523, Sec. 106.
- North End Sav. Bank vs. Snow, 197 Mass. 339, Sec. 90.
- North St. Louis Building & Loan Assn. vs. Obert, 169 Mo. 507, Sec. 122.
- Northumberland vs. Cobleigh, 59 N. H. 250, Sec. 122.
- Northwestern Nat. Bank vs. Kean, 14 Phila. Rep. 7, Sec. 132.
- Northwestern R. R. Co. vs. Whinray, 10 Ex. 77, Sec. 132.
- Northrup vs. Garrett, 17 Hun 497, Sec. 208.
- Norton vs. Coons, 3 Denio 130, Sec. 262.
 vs. Davis, 13 Tex. Civ. App. 90, Sec. 188.
 vs. Hall, 41 Vt. 471, Sec. 284.
 vs. Kumpe, 121 Ala. 446, Sec. 159.
 vs. Reid, 11 S. C. 593, Sec. 281.
- Norwood vs. Harness, 98 Ind. 134, Sec. 166.
- Novak vs. Pitlick, 120 Iowa 286, Sec. 122.
- Noyes vs. Granger, 51 Iowa 227, Sec. 17, 125.
 vs. Humphreys, 11 Gratt. (Va.) 636, Sec. 36, 46.
 vs. Nichols, 28 Vt. 159, Sec. 50, 66.
- Nugent vs. Wolfe, 111 Pa. St. 471, Sec. 34.

(References are to sections.)

O

- Oak vs. Dustin, 79 Me. 23, Sec. 14.
 Oakley vs. Weller, 16 Vt. 63, Sec. 65.
 Oaks vs. VanNoppen, 100 N. C. 287, Sec. 185.
 Oberbek vs. Mayer, 59 Mo. App. 280, Sec. 126, 131.
 Oberne vs. Gaylord, 13 Ill. App. 30, Sec. 208.
 Odell vs. Howle, 77 Va. 361, Sec. 222.
 Oelrichs vs. Spain, 15 Wall. 211, Sec. 197.
 Offley vs. Johnson, 2 Leon 166, Sec. 262.
 Offord vs. Davie, 12 J. Scott (N.S.) 748, Sec. 71.
 Offterdinger vs. Ford, 92 Va. 636, Sec. 203.
 Ogden vs. Davis, 116 Cal. 32, Sec. 181.
 Ohio vs. Jennings, 4 O. S. 419, Sec. 164.
 Ohio & Miss. Ry. vs. Hardy, 64 Ind. 454, Sec. 12.
 Ohio County vs. Clemens, 85 W. Va. 11, Sec. 233.
 Ohmer vs. Boyer, 89 Ala. 273, Sec. 251.
 Oklahoma State Bank vs. Seaton, (Okla.) 170 Pac. 477, Sec. 8.
 Oldham vs. Broom, 28 O. S. 41, Sec. 264.
 Olean vs. King, 116 N. Y. 355, Sec. 172.
 Oliphint vs. Mansfield, 36 Ark. 191, Sec. 197.
 Olmsted vs. Olmsted, 38 Conn. 309, Sec. 17.
 Olmstead vs. Latimer, 158 N. Y. 313, Sec. 82.
 Olsen vs. W. H. Birch & Co., 1 Cal. App. 99, Sec. 182.
 Omro Supervisors vs. Kaine, 39 Wis. 468, Sec. 166.
 Opp vs. Ward, 125 Ind. 241, Sec. 254.
 Ordeman vs. Lawson, 49 Md. 135, Sec. 62.
 Ordinary vs. Kershaw, 14 N. J. Eq. 527, Sec. 221.
 Ordinary of New Jersey vs. Thatcher, 12 Vroom 403, Sec. 127.
 Oregon Ry. & Nav. Co. vs. Swinburne, 22 Ore. 574, Sec. 123, 128, 135.
 Orem vs. Wrightson, 51 Md. 34, Sec. 248.
 Orleans & J. Ry. Co. vs. International Construction Co., 113 La. 409, Sec. 76.
 Orrick vs. Colston, 7 Gratt. 189, Sec. 10, 129.
 vs. Durham, 79 Mo. 174, Sec. 23, 251.
 vs. Vahey, 49 Mo. 428, Sec. 218.
 Orton vs. Lincoln, 156 Ill. 499, Sec. 163.
 O'Brien vs. Murphy, 175 Mass. 253, Sec. 129.
 O'Connell vs. Mt. Holyoke College, 174 Mass. 511, Sec. 42.
 O'Connor vs. Braly, 112 Cal. 31, Sec. 96.
 vs. Decker, 95 Wis. 202, Sec. 166.
 O'Donnell vs. Colby, 153 Ill. 324, Sec. 215.
 vs. Leeman, 43 Me. 158, Sec. 29.
 O'Hara vs. Haas, 46 Miss. 374, Sec. 250, 251.
 O'Howell vs. Kirk, 41 Mo. App. 523, Sec. 112.
 O'Leary vs. Martin, 21 La. Ann. 389, Sec. 8.
 O'Neal vs. Kelley, 65 Ark. 550, Sec. 76-a.
 vs. State, 35 Tex. 130, Sec. 229.
 O'Neil vs. Nelson, 22 Ill. App. 531, Sec. 185.

(References are to sections.)

- O'Neill vs. State Sav. Bank, 34 Mont. 521, Sec. 255.
 vs. Title Guar. & Trust Co., 191 Fed. 570, Sec. 76-b.
- Osborn vs. Cunningham, 4 Dev. & Bat. Law (N. C.) 423, Sec. 279.
 vs. Hendrickson, 6 Cal. 175, Sec. 186.
 vs. Low, 40 S. W. 347, Sec. 83.
 vs. Robbins, 36 N. Y. 365, Sec. 15, 103.
- Osborne vs. Baker, 34 Minn. 307, Sec. 44.
 vs. Bryce, 23 Fed. Rep. 171, Sec. 117.
 vs. Endicott, 6 Cal. 149, Sec. 46.
 vs. Gullikson, 64 Minn. 218, Sec. 61.
 vs. Lawson, 26 Mo. App. 549, Sec. 57.
 vs. Stone, 30 Minn. 25, Sec. 11.
- Otis vs. Von Storch, 15 R. 1. 41, Sec. 98, 112.
- Oury vs. Saunders, 77 Tex. 278, Sec. 259.
- Overden, Gurney & Co. vs. Oriental Financial Corp., L. R., 7 H. L. 348,
 Sec. 86, 90.
- Ovington vs. Smith, 78 Ill. 250, Sec. 193.
- Owen vs. Baker, 101 Mo. 407, Sec. 173.
 vs. Homan, 3 Macn. & G. 378, Sec. 15, 92, 106.
 vs. Long, 112 Mass. 403, Sec. 11.
 vs. McGehee, 61 Ala. 440, Sec. 253, 269.
- Owens vs. Miller, 29 Md. 144, Sec. 255.
 vs. Mynatt, 1 Heisk. (Tenn.) 675, Sec. 14.
- Oxford Bank vs. Haynes, 8 Pick. 423, Sec. 67.
 vs. Lewis, 8 Pick. 458, Sec. 83.

. P

- Pace vs. Ficklin, 76 Va. 292, Sec. 181.
 vs. Mississippi, 25 Miss. 54, Sec. 228.
 vs. Pace, 19 Fla. 438, Sec. 218.
 vs. Pace, 95 Va. 792, Sec. 252, 273.
- Pace Grocery Co. vs. Savage, 114 S. W. 866, Sec. 181.
- Pacific Fire Ins. Co. vs. Pacific Surety Co., 93 Cal. 7, Sec. 240.
- Pacific Mail S. S. Co. vs. Leuling, 7 Abb. Pr. (N. S.) 37, Sec. 193.
 vs. Toel, 85 N. Y. 646, Sec. 193.
- Pacific National Bank vs. Mixter, 124 U. S. 721, Sec. 202.
- Packard vs. Brewster, 59 Me. 404, Sec. 148.
 vs. Richardson, 17 Mass. 122, Sec. 27.
- Packer vs. Benton, 35 Conn. 343, Sec. 38.
- Paddleford vs. Thacher, 48 Vt. 574, Sec. 102.
- Page vs. Krekey, 137 N. Y. 307, Sec. 15, 108.
- Pahlman vs. Taylor, 75 Ill. 629, Sec. 73.
- Pain vs. Packard, 13 Johns. 174, Sec. 116.
- Paine vs. Voorhees, 26 Wis. 522, Sec. 85.
- Palmer vs. Bagg, 56 N. Y. 523, Sec. 53.
 vs. Foley, 71 N. Y. 106, Sec. 192, 193.

(References are to sections.)

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Pannill's Admr. vs. Calloway, 78 Va. 387, Sec. 19.
Parham vs. Green, 64 N. C. 436, Sec. 269.
Parham Sewing Machine Co. vs. Brock, 113 Mass. 194, Sec. 53.
Park Bros. & Co. vs. Sykes, 67 Minn. 153, Sec. 131.
Parke vs. White River Co., 110 Cal. 658, Sec. 73.
Parker vs. Jeffrey, 26 Ore. 186, Sec. 131.
 vs. State, 8 Blackf. (Ind.) 292, Sec. 174.
Parker & Co. vs. Guillot, 118 La. 223, Sec. 82.
Parkman vs. Brewster, 15 Gray 271, Sec. 61.
 vs. Vail, 73 Ill. 343, Sec. 8, 10, 16.
Parkhurst vs. Van Cortlandt, 1 Johns. Ch. 273, Sec. 29.
Parks vs. Ross, 11 How. 362, Sec. 161.
 vs. Wilson, 10 Mod. 515, Sec. 135.
Parmele vs. Brashear, 16 La. 72, Sec. 218.
Parmelee vs. Thompson, 45 N. Y. 58, Sec. 82.
Parshall vs. Lamorcaux, 37 Barb. 189, Sec. 103.
Parr vs. State, 71 Md. 220, Sec. 225.
Parnell vs. Hancock, 48 Cal. 452, Sec. 185.
Parrott vs. Kane, 14 Mont. 23, Sec. 190.
Partin vs. Prince, 159 N. C. 533, Sec. 32.
Partridge vs. Davis, 20 Vt. 499, Sec. 51.
 vs. Jones, 38 O. S. 375, Sec. 20, 121.
Pashby vs. Mandigo, 42 Mich. 172, Sec. 270.
Passumpsic Bank vs. Goss, 31 Vt. 315, Sec. 111.
Paskusz vs. Bodner, 75 N. J. L. 447, Sec. 60.
Patt vs. Gerst, 149 Ala. 287, Sec. 29.
Patterson vs. Freeland, 38 N. J. L. 255, Sec. 153.
 vs. Gibson, 81 Ga. 802, Sec. 14.
 vs. McNeely, 16 O. S. 348, Sec. 72.
Patchin vs. Swift, 21 Vt. 292, Sec. 27.
Patmor vs. Haggard, 78 Ill. 607, Sec. 27.
Patten's Appeal, 45 Pa. St. 151, Sec. 252.
Patterson vs. Chapman, 179 Cal. 203, Sec. 126.
Patton vs. Mills, 21 Kan. 163, Sec. 39.
Paton vs. Stewart, 78 Ill. 481, Sec. 112.
Patzack vs. Von Gerichten, 10 Mo. App. 424, Sec. 168.
Paulin vs. Kaighn, 29 N. J. L. 480, Sec. 274.
Pauly Jail Bldg. Co. vs. Collins, 138 Wis. 494, Sec. 99.
Paul vs. Stackhouse, 38 Pa. 302, Sec. 16, 57.
Pavarini & Wyne vs. Title Guar. & Sur. Co., 36 App. D. C. 348, Sec. 281.
Pawling vs. United States, 4 Cranch 219, Sec. 109, 127.
Paxton vs. State, 59 Neb. 460, Sec. 148, 150, 174.
Payne vs. Paehr, 153 Cal. 441, Sec. 159.
 vs. Powell, 14 Tex. 600, Sec. 83.
Peabody vs. State, 4 O. S. 387, Sec. 156.
Peacock vs. The People, 83 Ill. 331, Sec. 14.
Pearl vs. Deacon, 24 Beav. 186, Sec. 98, 118.

(References are to sections.)

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 Pearsell Mfg. Co. vs. Jeffreys, 183 Mo. 386, Sec. 60.
 Pearson vs. State, 7 Tex. App. 279, Sec. 230.
 Peck vs. Frink, 10 Iowa 193, Sec. 63, 67.
 vs. Harris, 57 Mo. App. 467, Sec. 126.
 vs. State, 63 Ala. 201, Sec. 228.
 vs. Vandemark, 99 N. Y. 29, Sec. 29.
 vs. Wilson, 22 Ill. 205, Sec. 213.
 Peckham vs. Gilman Co., 7 Minn. 446, Sec. 8, 10.
 Pegram vs. Riley, 88 Ala. 399, Sec. 269.
 Peirce vs. Bent, 69 Me. 381, Sec. 117.
 Pelham vs. Grigg, 4 Ark. 141, Sec. 121.
 Penn vs. Hamlett, 27 Grat. 337, Sec. 109.
 vs. Ingles, 82 Va. 65, Sec. 118.
 Pennell vs. Card, 96 Me. 392, Sec. 137.
 Pennington vs. Newman, 36 Okl. 594, Sec. 220.
 Penniman vs. Richardson, 3 La. 101, Sec. 193.
 Penny vs. Crane Bros. Mfg. Co., 80 Ill. 244, Sec. 61, 67.
 Penoyer vs. Watson, 16 Johns. 100, Sec. 52.
 Pendleton vs. Bank of Kentucky, 1 T. B. Mon. 171, Sec. 130.
 Pendlebury vs. Walker, 4 Younge & C. 424, Sec. 105.
 Pencinse vs. Burton, 9 Ore. 178, Sec. 181.
 Pendery vs. Allen, 50 O. S. 121, Sec. 255.
 Pence vs. Makepeace, 75 Ind. 480, Sec. 217.
 People vs. Admire, 39 Ill. 251, Sec. 220.
 vs. Backus, 117 N. Y. 196, Sec. 5.
 vs. Bartels, 138 Ill. 322, Sec. 171.
 vs. Borders, 31 Ill. App. 426, Sec. 225.
 vs. Bostwick, 32 N. Y. 445, Sec. 74, 109.
 vs. Bowman, 147 Ill. App. 67, Sec. 156.
 vs. Brooks, 22 Ill. App. 594, Sec. 225.
 vs. Brown, 2 Doug. (Mich.) 9, Sec. 151.
 vs. Bush, 40 Cal. 344, Sec. 169.
 vs. Buster, 11 Cal. 215, Sec. 114.
 vs. Chalmers, 60 N. Y. 154, Sec. 227.
 vs. Chisholm, 8 Cal. 29, Sec. 114.
 vs. Cobb, 10 Col. App. 478, Sec. 163.
 vs. Dennis, 4 Mich. 609, Sec. 231.
 vs. Fidelity & Casualty Co., 153 Ill. 25, Sec. 233.
 vs. Gillman, 125 N. Y. 372, Sec. 231.
 vs. Grant, 138 Mich. 60, Sec. 85.
 vs. Hanaw, 106 Mich. 421, Sec. 229, 232.
 vs. Hartley, 21 Cal. 585, Sec. 149.
 vs. Healy, 128 Ill. 9, Sec. 110.
 vs. Hilton, 36 Fed. Rep. 172, Sec. 163.
 vs. Holley, 12 Wend. 481, Sec. 150.
 vs. Huson, 78 Cal. 154, Sec. 19, 148.
 vs. Knickerbocker, 114 Ill. 539, Sec. 180.

(References are to sections.)

- People vs. Lee, 104 N. Y. 441, Sec. 55.
 vs. Love, 19 Cal. 676, Sec. 146.
 vs. Lucas, 93 N. Y. 585, Sec. 182.
 vs. McHatton, 2 Gilm. (Ill.) 638, Sec. 87.
 vs. McReynolds, 102 Cal. 308, Sec. 232.
 vs. May, 158 Ill. App. 596, Sec. 159.
 vs. McGrath, 279 Ill. 550, Sec. 163, 166.
 vs. Meacham, 74 Ill. 292, Sec. 231, 245.
 vs. Metropolitan Surety Co., 132 N. Y. S. 829, Sec. 255.
 vs. Meyer, 29 N. Y. Supp. 1148, Sec. 232.
 vs. Moore, 4 N. Y. Cr. Rep. 205, Sec. 232.
 vs. Pacific Surety Co., 50 Colo. 273, Sec. 121.
 vs. Pacific Surety Co., 130 Ill. App. 502, Sec. 223.
 vs. Paresi, 217 N. Y. 24, Sec. 232.
 vs. Perkins, 85 Cal. 509, Sec. 150.
 vs. Petrie, 191 Ill. 497, Sec. 218.
 vs. Rardin, 171 Ill. App. 226, Sec. 222.
 vs. Rathbone, 145 N. Y. 434, Sec. 145.
 vs. Remington & Sons, 121 N. Y. 328, Sec. 252.
 vs. Robb, 98 Mich. 397, Sec. 232.
 vs. Rose, 174 Ill. 310, Sec. 233.
 vs. Rubright, 160 Ill. App. 528, Sec. 231.
 vs. Russell, 25 Hun 524, Sec. 175.
 vs. Schuyler, 4 N. Y. 173, Sec. 164, 165, 248.
 vs. Seelye, 146 Ill. 189, Sec. 225.
 vs. Sharp, 133 Mich. 378, Sec. 23-a.
 vs. Smith, 123 Cal. 70, Sec. 159.
 vs. Stephens, 71 N. Y. 527, Sec. 161.
 vs. Suhre, 97 Ill. App. 231, Sec. 168.
 vs. Tice, 272 Ill. 516, Sec. 119.
 vs. Van Ness, 79 Cal. 84, Sec. 178.
 vs. Vilas, 36 N. Y. 459, Sec. 152.
 vs. Warren, 5 Hill. (N. Y.) 440, Sec. 172.
 vs. Welch, 47 How. Pr. 420.
 vs. White, 28 Hun 289, Sec. 227.
 vs. Zingraf, 43 Ill. App. 337, Sec. 175, Sec. 229.
- People, ex rel., Kasson vs. Rose, 174 Ill. 310, Sec. 233.
- Peoples Bank vs. Legrand, 103 Pa. 309, Sec. 101.
 vs. National Bank, 101 U. S. 181, Sec. 11.
 vs. Pearsons, 30 Vt. 711, Sec. 83.
 vs. Stewart, 152 Mo. App. 314, Sec. 67.
- Peoples Bank of Greensboro vs. Steinhart, 65 So. 60, Sec. 11.
- Peoples Bldg. & Loan Ass. vs. Wroth, 43 N. J. L. 70, Sec. 129, 135.
- Peoples Savings Bank vs. Compau, 124 Mich. 106, Sec. 137.
- Peoples State Bank vs. Miller, 85 Kas. 272, Sec. 253.
- People of Porto Rico vs. Title Guaranty & Sur. Co., 227 U. S. 382, Sec. 103.
- Peoria Savings Co. vs. Elder, 165 Ill. 55, Sec. 50.
- Peppin vs. Cooper, 2 Barn. & Ald. 431, Sec. 153.
- Perkins vs. Catlin, 11 Conn. 213, Sec. 8, 63.
 vs. Elliott, 23 N. J. Eq. 526, Sec. 11.
 vs. Klein, 62 Ill. App. 585, Sec. 185.
 vs. Shadbolt, 44 Wis. 574, Sec. 181.
- Perkins, Admr., vs. Barstow, 6 R. I. 505, Sec. 8, 10.
- Perkins Co. vs. Miller, 55 Neb. 141, Sec. 146.

(References are to sections.)

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 Perley vs. Muskegon Co., 32 Mich. 132, Sec. 166.
 Perrine vs. Firemen's Ins. Co., 22 Ala. 575, Sec. 101.
 Peterson vs. Russell, 62 Minn. 220, Sec. 57.
 Peters vs. Snavelly-Ashton, 144 Iowa 147, Sec. 208.
 Petty vs. Cooke, L. R., 6 Q. B. 790, Sec. 97.
 vs. Douglass, 76 Mo. 70, Sec. 115.
 vs. Lang, 81 Tex. 238, Sec. 203.
 vs. People, 118 Ill. 148, Sec. 230.
 Pettee vs. Peppard, 120 Mass. 522, Sec. 142.
 Pettit vs. Mercer, 8 B. Mon. (Ky.) 51, Sec. 200, 203, 208.
 Petillon vs. Noble, 73 Ill. 567, Sec. 255.
 Pfaelzer vs. Kau, 207 Ill. 116, Sec. 67, 68.
 Pfeiffer vs. Kingsland, 25 Mo. 66, Sec. 16.
 Phares vs. Barbour, 49 Ill. 370, Sec. 99.
 Phelps vs. Call, 7 Ired. (N. C.) 262, Sec. 121.
 vs. Stone, 172 Mass. 355, Sec. 36.
 vs. Vischer, 50 N. Y. 69, Sec. 8, 10.
 Phelan vs. Johnson, 80 Iowa 727, Sec. 187.
 Philadelphia vs. Fidelity & Dep. Co., 231 Pa. 208, Sec. 81, 233, 238.
 vs. Madden, 23 Pa. Co. Ct. Rep. 39, Sec. 131.
 vs. Ray, 266 Pa. 345, Sec. 238.
 vs. Stewart, 201 Pa. 526, Sec. 76-a.
 vs. Stewart, 201 Pa. 526, Sec. 76-a.
 Philadelphia & R. R. Co. vs. Knight, 124 Pa. St. 58, Sec. 11.
 Philadelphia & Reading Ry vs. Little, 41 N. J. Eq. 519, Sec. 115.
 Philbrooks vs. McEwen, 29 Ind. 347, Sec. 99.
 Phillimore vs. Barry, 1 Camp. 513, Sec. 30.
 Phillips vs. Bossard, 35 Fed. Rep. 99, Sec. 107.
 vs. Foxall, L. R., 7 Q. B. 666, Sec. 107.
 vs. Poole, 96 Ga. 515, Sec. 143.
 vs. Ross, 36 O. S. 458, Sec. 227.
 vs. Rounds, 33 Me. 357, Sec. 91.
 vs. Singer Mfg. Co., 28 Ill. 305, Sec. 143.
 vs. Solomon, 42 Ga. 192, Sec. 100.
 vs. State, 100 Ark. 515, Sec. 232.
 Phippsburg vs. Dickinson, 78 Me. 457, Sec. 156.
 Phoenix Ins. Co. vs. Finley, 59 Iowa 591, Sec. 107, 134.
 Phoenix Mfg. Co. vs. Bogardus, 231 Ill. 528, Sec. 17.
 Phoenix Pad Co. vs. American Coat Co., 111 Md. 549, Sec. 195.
 Pickett vs. Hawes, 14 Iowa 460, Sec. 67.
 Pickett vs. Andrews, 135 Ga. 299, Sec. 117.
 vs. State, 16 Tex. App. 648, Sec. 229.
 Pickens vs. Miller, 83 N. C. 543, Sec. 219.
 vs. Yarborough, 26 Ala. 417, Sec. 115.
 Pico vs. Webster, 14 Cal. 202, Sec. 175.
 Pidecock vs. Bishop, 3 Barn. & Cr. 605, Sec. 15, 105.
 Pierce vs. Banta, 9 Ind. App. 376, Sec. 190.
 vs. Hardee, 1 Thomp. & Cook (N. Y.) 557, Sec. 212.

(References are to sections.)

- Pierce vs. Holzer, 65 Mich. 263, Sec. 248.
 vs. King, 14 R. I. 611, Sec. 212.
 vs. Knight, 31 Vt. 701, Sec. 96.
 vs. Richardson, 37 N. H. 306, Sec. 148.
 vs. Whiting, 63 Cal. 538, Sec. 205.
 vs. Williams, 23 L. J. Ex. 322, Sec. 283.
- Piercy vs. Piercy, 36 N. C. 214, Sec. 190.
- Pierson vs. Catlin, 18 Vt. 77, Sec. 254.
 vs. Ells, 46 Hun 336, Sec. 193.
- Pike vs. Megoun, 44 Mo. 491, Sec. 169.
- Pile vs. McCoy, 99 Tenn. 367, Sec. 268.
- Pill vs. State, 43 Neb. 23, Sec. 230.
- Pine Co. vs. Willard, 39 Minn. 125, Sec. 156.
- Pinkstaff vs. The People, 59 Ill. 148, Sec. 218.
- Pioneer Co. vs. Freeburg, 59 Minn. 230, Sec. 77.
- Piper vs. Pearson, 2 Gray 120, Sec. 168.
- Pittman vs. Chisolm, 43 Ga. 442, Sec. 62.
- Pittsburg, etc., Ry. Co. vs. Shaeffer, 59 Pa. 350, Sec. 107.
- Place vs. Taylor, 22 O. S. 317, Sec. 164, 169.
- Plankinton vs. Gorman, 93 Wis. 560, Sec. 98.
- Plano Mfg. Co. vs. Burrows, 40 Kan. 361, Sec. 142.
 vs. Parmenter, 41 Ill. App. 635, Sec. 102.
- Planters Bank vs. Hudgins, 84 Ga. 108, Sec. 186.
- Planters Loan & Savings Bank vs. Berry, 91 Ga. 264, Sec. 202.
- Platter vs. Green, 26 Kan. 252, Sec. 66.
- Pleasantville Loan Soc. vs. Moore, 70 N. J. L. 306, Sec. 61, 67.
- Pledge vs. Buss, Johnson, 663, Sec. 98.
- Plumb vs. Woodmansee, 34 Iowa 116, Sec. 208.
- Plummer, et al., vs. The People, 16 Ill. 358, Sec. 15.
- Plunkett vs. Sewing Machine Co., 84 Md. 529, Sec. 73.
- Poe vs. Phila. Casualty Co., 118 Md. 347, Sec. 247.
 vs. Dixon, 60 O. S. 124, Sec. 280.
- Poignard vs. Vernon, 1 T. B. Mon. (Ky.) 45, Sec. 219.
- Polak vs. Everett, 1 Q. B. Div. 676, Sec. 79, 98.
- Pollock vs. Gantt, 69 Ala. 373, Sec. 204.
- Polhill vs. Brown, 84 Ga. 338, Sec. 280.
- Polkinghorne vs. Hendricks, 61 Miss. 366, Sec. 83.
- Pollitz vs. Pub. Util. Comm., 96 O. S. 49, Sec. 11.
- Pond vs. Dougherty, 92 Pac. 1035, Sec. 248.
 vs. United States, 111 Fed. 989, Sec. 71.
- Pond Creek Coal Co. vs. Citizens Trust, etc., Co., 170 Ky. 601, Sec. 76-a.
- Pool vs. Doster, 59 Miss. 258, Sec. 255.
- Poole vs. Cox, 9 Ired. L. (N. C.) 69, Sec. 158.
 vs. Rice, 9 W. Va. 73, Sec. 85.
- Pooley vs. Harradine, 7 El. & Bl. 431, Sec. 90.
- Port vs. Robbins, 35 Iowa 208, Sec. 112.
- Portage Bank vs. Lane, 8 O. S. 405, Sec. 20.
- Porter vs. Drennan, 13 Brad. (Ill. App.) 362, Sec. 45.
 vs. Hodenpuy, 9 Mich. 11, Sec. 94.
 vs. Singleton, 28 Ark. 483, Sec. 185.
 vs. Vanderlin, 146 Pa. 138, Sec. 244.
 vs. Wormser, 94 N. Y. 431, Sec. 46.

(References are to sections.)

- Post vs. Doremus, 60 N. Y. 371, Sec. 182.
 Post, Admr., vs. Losey, 111 Ind. 74, Sec. 79, 100.
 Post vs. Clem, 201 Ala. 529, Sec. 32.
 Postmaster Genl vs. Norvell, Gilp. 106, Sec. 148.
 Pott vs. Nathans, 1 Watts & Serg. (Pa.) 155, Sec. 263.
 Pott & Co. vs. Schmucker, 84 Md. 535, Sec. 76.
 Potter vs. Gronbeck, 117 Ill. 404, Sec. 71.
 vs. Ogden, 136 N. Y. 384, Sec. 222.
 vs. Stevens, 40 Mo. 229, Sec. 255.
 vs. State, 23 Ind. 550, Sec. 20.
 Potvin vs. Meyers, 27 Neb. 749, Sec. 247, 249.
 Poullain vs. Brown, 80 Ga. 27, Sec. 144.
 Powell vs. Bradley, 9 Gill. & Johns. (Md.) 220, Sec. 110.
 vs. Chicago Carpet Co., 22 Ill. App. 409, Sec. 65.
 vs. Jones, 1 Ired. Eq. N. C. 337, Sec. 248.
 vs. Kettelle, 6 Ill. 491, Sec. 119.
 vs. Powell, 48 Cal. 234, Sec. 144, 219, 263.
 vs. Smith, 8 Johns. 249, Sec. 253.
 Power vs. Burmester, 34 N. Y. S. 716, Sec. 2231.
 vs. Rankin, 114 Ill. 52, Sec. 40.
 Powers vs. Bumeratz, 12 O. S. 273, Sec. 66.
 vs. Chabot, 93 Cal. 266, Sec. 182.
 vs. Loughridge, 38 N. J. Eq. 396, Sec. 166.
 Powers Dry Goods Co. vs. Harlin, 68 Minn. 193, Sec. 105.
 Powles vs. Hargreaves, 3 DeG., M. & G. 430, Sec. 256.
 Pratt vs. Conway, 148 Mo. 291, Sec. 90.
 vs. Hedden, 121 Mass. 116, Sec. 9, 16.
 vs. Thornton, 28 Me. 355, Sec. 255.
 Prairie State Bank vs. United States, 164 U. S. 227, Sec. 248.
 Pray vs. Wasdell, 146 Mass. 324, Sec. 181, 183.
 Prescott vs. Brinsley, 6 Cush. 233, Sec. 78.
 vs. Hull, 23 Gratt. 600, Sec. 109, 121.
 Prescott National Bank vs. Head, 11 Ariz. 213, Sec. 76-a.
 Preston vs. Garrard, 120 Ga. 689, Sec. 90.
 vs. Gould, 64 Iowa 44, Sec. 278.
 Pressed Radiator Co. vs. Hughes, 155 Ill. App. 80, Sec. 66.
 Prefontaine vs. Richards, 47 Hun 418, Sec. 183.
 Price vs. Barker, 4 El. & Bl. 760, Sec. 92, 102, 114.
 vs. Barnes, 7 Ind. App. 1, Sec. 150, 225.
 vs. Courtney, 87 Mo. 387, Sec. 259.
 vs. Dime Savings Bank, 124 Ill. 317, Sec. 81.
 vs. Easton, 4 Barn. & Ad. 433, Sec. 142.
 vs. Horton, 4 Tex. Civ. App. 526, Sec. 282.
 vs. Lavender, 38 Ala. 389, Sec. 8, 10.
 vs. Sanders, 60 Ind. 310, Sec. 259.
 vs. Scott, 13 Wash. 574, Sec. 134.
 vs. Trusdell, 28 N. J. Eq. 200, Sec. 255.
 Prime vs. Koehler, 77 N. Y. 91, Sec. 39.

(References are to sections.)

- Prior vs. Kiso, 81 Mo. 241, Sec. 73.
 Pritchard vs. Hitchcock, 6 Man. & G. 151, Sec. 97.
 Prince vs. Skillin, 71 Mc. 361, Sec. 145.
 Prickett vs. People, 88 Ill. 115, Sec. 152.
 Probate Court vs. Brainard, 48 Vt. 620, Sec. 219.
 vs. Kent, 49 Vt. 380, Sec. 220.
 vs. Williams, 30 R. 1. 144, Sec. 218.
 Probate Judge vs. Mathes, 60 N. H. 433, Sec. 217.
 Proctor vs. Dicklow, 57 Kan. 119, Sec. 221.
 Proseck vs. State, 38 O. S. 606, Sec. 229.
 Prout vs. Webb, 87 Ala. 503, Sec. 41.
 Providence Machine Co. vs. Browning, 68 S. C. 1, Sec. 61, 67.
 Prussing vs. Lancaster, 234 Ill. 462, Sec. 83.
 Pulliam & Payne vs. Withers, 8 Dana (Ky.) 98, Sec. 16.
 Punta Gorda Bank vs. State Bank, 52 Fla. 399, Sec. 49.
 Pundmann vs. Schoenich, 144 Mo. 149, Sec. 174.
 Pursifull vs. Pineville Banking Co., 97 Ky. 154, Sec. 101.
 Purviance vs. Sutherland, 2 O. S. 478, Sec. 279.
 Putnam vs. Schuyler, 4 Hun (N. Y.) 166, Sec. 15, 103.
 Putney vs. Farnham, 27 Wis. 187, Sec. 40, 43.
 vs. Schmidt, 16 N. M. 400, Sec. 15, 106.
 Pybus vs. Gibb, 6 El. & Bl. 902, Sec. 87, 152.
 Pynes vs. State, 45 Ala. 52, Sec. 232.

Q

- Queal & Co. vs. Peterson, 138 Iowa 514, Sec. 57.
 vs. Stradley, 117 Iowa 748, Sec. 76-b.
 Quillen vs. Quigley, 14 Nev. 215, Sec. 115, 186.
 Quinlan vs. Insurance Co., 133 N. Y. 356, Sec. 241.
 Quinn vs. Hard, 43 Vt. 375, Sec. 108.
 Quinn-Shepherdson Co. vs. U. S. F. & G. Co., 142 Minn. 428, Sec. 32.

R

- Raabe vs. Squier, 148 N. Y. 81, Sec. 39.
 Rabberman vs. Wiskamp, 54 Ill. 179, Sec. 43.
 Rabbitt vs. Finn, 101 U. S. 7, Sec. 187.
 Rachelman vs. Skinner, 46 Minn. 196, Sec. 203.
 Railton vs. Mathews, 10 Cl. & Fin. 934, Sec. 15, 106, 127.
 Railroad Co. vs. Trimble, 10 Wall. 367, Sec. 49.
 Railsback vs. Greve, 58 Ind. 72, Sec. 183.
 Rainbow vs. Juggins, 5 Q. B. Div. 422, Sec. 98.
 Raikes vs. Todd, 8 Ad. & Ell. 846, Sec. 26.
 Ralston vs. Wood, 15 Ill. 159, Sec. 217.
 Ramey vs. Commonwealth, 83 Ky. 534, Sec. 229, 230, 272.

(References are to sections.)

- Ramsay's Estate vs. People, 198 Ill. 572, Sec. 148, 166.
 vs. Whitbeck, 183 Ill. 550, Sec. 279.
- Rand vs. Barrett, 66 Iowa 731, Sec. 244.
- Randall vs. Carpenter, 88 N. Y. 293, Sec. 197.
 vs. Howard, 2 Black. (U. S.) 585, Sec. 46.
- Randol vs. Tatum, 98 Cal. 390, Sec. 96.
- Rankin vs. Collins, 50 Ind. 158, Sec. 269.
 vs. Tygard, 198 Fed. 795, Sec. 72, 129.
- Rapelye vs. Bailey, 3 Conn. 438, Sec. 66.
- Rapp vs. Phoenix Co., 113 Ill. 390, Sec. 107, 119.
- Ratliff vs. Trout, 6 J. J. Marsh. 605, Sec. 27.
- Raubitschek vs. Blank, 80 N. Y. 478, Sec. 28.
- Rawleigh Medical Co. vs. Tarpley, 5 Ala. App. 412, Sec. 6.
 vs. Wilson, 7 Ala. App. 242, Sec. 15, 168, 169.
- Rawlings vs. Adams, 7 Md. 26, Sec. 135.
- Rawson vs. Taylor, 30 O. S. 389, Sec. 23, 90.
- Raymond vs. Green, 12 Neb. 215, Sec. 208.
- Read vs. Cutts, 7 Greenl. 186, Sec. 67.
 vs. McLemore, 34 Miss. 110, Sec. 111.
- Reader vs. Kingham, 13 C. B. N. S. 344, Sec. 32.
- Ream vs. Lynch, 7 Ill. App. 161, Sec. 226.
- Realization Co. vs. American Bonding Co., 88 O. S. 216, Sec. 253.
- Redwood Co. vs. Tower, 28 Minn. 45, Sec. 167.
- Redlon vs. Heath, 59 Kas. 255, Sec. 99.
- Red River Nat. Bank vs. Bray, 105 Tex. 312, Sec. 82.
- Red Wing Sewer Pipe Co. vs. Donnelly, 102 Minn. 192, Sec. 19, 134.
- Reece vs. Northway, 58 Iowa 187, Sec. 197.
- Reed vs. Evans, 17 O. 128, Sec. 27.
 vs. McCourt, 41 N. Y. 435, Sec. 134.
 vs. Norris, 2 Mylne & Craig 361, Sec. 282.
- Rees vs. Berrington, 2 Ves. 540, Sec. 81.
- Reese vs. People, 11 Ill. App. 346, Sec. 231.
 vs. United States, 9 Wall. 13, Sec. 79, 91, 229.
- Reeves vs. Chambers, 67 Iowa 81, Sec. 117.
- Regan vs. Williams, 185 Mo. 620, Sec. 90.
- Regina vs. Lane, 2 Ld. Raym. 1304, Sec. 145.
- Reid vs. Flippen, 47 Ga. 273, Sec. 284.
- Reissaus vs. Whites, 128 Mo. App. 135, Sec. 76-a.
- Reinhart vs. Johnson, 62 Iowa 155, Sec. 253.
- Reinheimer vs. Carter, 31 O. S. 579, Sec. 45.
- Reissner vs. Oxley, 80 Ind. 580, Sec. 49.
- Reisenleiter vs. Lutherische Kirche, 29 Mo. App. 291, Sec. 49.
- Reilly vs. Dodge, 131 N. Y. 153, Sec. 71.
- Reichenbach vs. Sage, 13 Wash. 364, Sec. 135.
- Remington S. M. Co. vs. Kezertee, 49 Wis. 409, Sec. 15, 106, 127.
- Remsen vs. Beekman, 25 N. Y. 552, Sec. 116.
- Renkert vs. Elliott, 79 Tenn. 235, Sec. 143, 200.

(References are to sections.)

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 Repair vs. Krebs Lumber Co., 80 S. E. 140, Sec. 36.
 Resseter vs. Waterman, 151 Ill. 169, Sec. 34.
 Reusch vs. Keenan, 42 La. Ann. 419, Sec. 115.
 Reuss vs. Picksley, L. R., 1 Ex. 342, Sec. 28.
 Revell vs. Smith, 25 Okl. 508, Sec. 197.
 vs. Thrash, 132 N. C. 803, Sec. 81, 83.
 Rey, et al., vs. Simpson, 22 Howard 341, Sec. 8, 112.
 Reynold vs. White, 118 N. Y. S. 979, Sec. 185.
 Reynolds vs. Douglass, 12 Pet. 497, Sec. 65.
 vs. Edney, 53 N. C. 406, Sec. 67.
 vs. Harral, 2 Strob. (S. C.) 87, Sec. 279.
 vs. Hennessy, 17 R. I. 169, Sec. 141.
 vs. Ward, 5 Wend. 501, Sec. 83.
 Rhea vs. Gibson's Exr., 10 Gratt. 215, Sec. 20, 109.
 Rheeling's Appeal, 107 Pa. 161, Sec. 259.
 Rhode vs. McLean, 101 Ill. 467, Sec. 23-a, 109.
 Rhodes vs. Matthews, 67 Ind. 131, Sec. 39.
 Rice vs. Cook, 92 Cal. 144, Sec. 196.
 vs. Downing, 12 B. Mon. (Ky.) 44, Sec. 245, 280.
 vs. Hardwick, 124 Pac. 800, Sec. 39.
 vs. McCague, 61 Neb. 861, Sec. 49.
 vs. Morris, 82 Ind. 204, Sec. 250.
 vs. Morton, 19 Mo. 263, Sec. 114.
 vs. Rice, 13 Ind. 562, Sec. 185.
 vs. Rice, 108 Ill. 199, Sec. 248.
 vs. Rice, 14 B. Mon. (Ky.) 335, Sec. 286.
 vs. Southgate, 16 Gray 142, Sec. 280.
 Richards vs. Day, 137 N. Y. 183, Sec. 124.
 vs. Market Ex. Bank, 81 O. S. 348, Sec. 8, 91-a, 115.
 vs. Osceola Bank, 79 Iowa 707, Sec. 115.
 vs. Storer, 114 Mass. 101, Sec. 202, 206.
 vs. The Commonwealth, 40 Pa. 146, Sec. 95.
 Richardson vs. Boynton, 12 Allen 138, Sec. 224.
 vs. County of Steuben, 226 N. Y. 13, Sec. 49.
 vs. Draper, 87 N. Y. 337, Sec. 119.
 vs. Gilbert, 135 Ill. App. 363, Sec. 214.
 vs. Robbins, 124 Mass. 105, Sec. 41.
 vs. Williams, 49 Me. 558, Sec. 40.
 Richardson Press vs. Albright, 224 N. Y. 497, Sec. 32.
 Richardson School Fund vs. Dean, 130 Mass. 242, Sec. 59.
 Richeson vs. Crawford, 94 Ill. 165, Sec. 248.
 Richie vs. Philadelphia, 225 Pa. 511, Sec. 145.
 Richmond Co. Supv. vs. Wandel, 6 Lans. 33, Sec. 160.
 Ricketson vs. Compton, 23 Cal. 636, Sec. 180.
 vs. Lizotte, 90 Vt. 386, Sec. 32.
 Riddle vs. McFadden, 112 N. Y. S. 498, Sec. 181.
 Ridgway vs. Ingram, 50 Ind. 145, Sec. 29.
 Ridgely vs. Bennett, 81 Tenn. 206, Sec. 180.
 Riddlesbarger vs. Insurance Co., 7 Wall. 386, Sec. 241.

(References are to sections.)

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 Riggs vs. Bell, 42 La. Ann. 666, Sec. 197.
 vs. Waldo, 2 Cal. 485, Sec. 10.
 Riley vs. Mitchell, 38 Minn. 9, Sec. 181.
 vs. Walker, 42 W. L. B. 275, Sec. 164.
 Rindge vs. Judson, 24 N. Y. 64, Sec. 18, 60.
 Ring vs. Kelly, 10 Mo. App. 411, Sec. 126.
 Ringgold vs. Newkirk, 3 Ark. 96, Sec. 67.
 Rindskopf vs. Doman, 28 O. S. 516, Sec. 94.
 Ripley vs. Gear, 58 Iowa 460, Sec. 199.
 Ripley Bldg. Co. vs. Coors, 37 Col. 78, Sec. 108.
 Rischer vs. Meehan, 11 O. C. C. 403, Sec. 164.
 Risley vs. Brown, 67 N. Y. 160, Sec. 69, 119.
 Rittenhouse vs. Levering, 6 Watts. & Serg. (Pa.) 190, Sec. 261.
 Ritter vs. Singmaster, 73 Pa. 400, Sec. 97.
 Rizer vs. Callen, 27 Kan. 339, Sec. 282.
 Roach vs. Gardner, 9 Gratt. 89, Sec. 193.
 Roberts vs. Donovan, 70 Cal. 108, Sec. 107.
 vs. Hawkins, 70 Mich. 566, Sec. 61, 67.
 vs. Richardson, 39 Iowa 290, Sec. 81.
 vs. Riddle, 79 Pa. 468, Sec. 61, 67.
 vs. State, 22 Tex. App. 64, Sec. 232.
 vs. State, 34 Kan. 151, Sec. 21.
 vs. Stewart, 31 Miss. 664, Sec. 82.
 Robertson vs. Angle, 76 S. W. 317, Sec. 115.
 vs. Findley, 31 Mo. 384, Sec. 16, 57.
 vs. Parks, 76 Md. 118, Sec. 110.
 vs. Sichel, 127 U. S. 507, Sec. 170.
 vs. Smith, 129 Ind. 422, Sec. 195.
 Robertson & Govanne Contracting Co. vs. Aetna Accident & L. Co., 91
 Conn. 129, Sec. 199.
 Robeson vs. Roberts, 20 Ind. 155, Sec. 99, 257.
 Robbins vs. Ayres, 10 Mo. 538, 539, Sec. 43, 142.
 vs. Bingham, 4 Johns. 476, Sec. 52.
 Robinson vs. Abell, 17 O. 36, Sec. 9.
 vs. Bartlett, 11 Minn. 410, Sec. 8.
 vs. Boyd, 60 O. S. 57, Sec. 262.
 vs. Brinson, 20 Tex. 438, Sec. 181.
 vs. Brown, 82 Ill. 279, Sec. 187.
 vs. Dale, 38 Wis. 330, Sec. 82, 85.
 vs. Garth, 6 Ala. 204, Sec. 22.
 vs. Godfrey, 2 Mich. 408, Sec. 93.
 vs. Gould, 11 Cush. 55, Sec. 14.
 vs. Hall, 33 Kan. 139, Sec. 147.
 vs. Hodge, 117 Mass. 222, Sec. 217.
 vs. Plimpton, 25 N. Y. 484, Sec. 189.
 vs. Recd, 46 Iowa 219, Sec. 10.
 vs. Soule, 56 Miss. 549, Sec. 100.
 vs. Sullivan, 102 Miss. 581, Sec. 244.
 vs. Teeter, 10 Ind. App. 698, Sec. 215.

(References are to sections.)

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- Rocco vs. Cicalla, 59 Tenn. 508, Sec. 214.
- Rockfield vs. First National Bank, 77 O. S. 311, Sec. 9.
- Rockville Bank vs. Holt, 58 Conn. 526, Sec. 94, 102.
- Rochester City Bank vs. Elwood, 21 N. Y. 88, Sec. 130.
- Rodgers vs. Maw, 15 M. & W. 444, Sec. 282.
- Rodini vs. Lytle, 17 Mont. 448, Sec. 175.
- Rodman vs. Moody, 14 Ky. L. Rep. 202, Sec. 184.
- Roe vs. Kiser, 62 Ark. 92, Sec. 284.
- Rogers vs. Harvey, 143 Ky. 88, Sec. 51.
- vs. Minneapolis Threshing Machine Co., 48 Wash. 19, Sec. 188.
- vs. School Trustees, 46 Ill. 428, Sec. 112.
- vs. Shaw, 59 Cal. 260, Sec. 133.
- vs. State, 99 Ind. 218, Sec. 156.
- Romadka Bros. Co., Re, 216 Fed. 113, Sec. 11.
- Romine vs. Romine, 59 Ind. 346, Sec. 282.
- Ronehel vs. Lofquist, 46 Ill. App. 442, Sec. 117.
- Roosevelt vs. Mark, 6 Johns. Ch. 266, Sec. 279.
- Root vs. Caldwell, 54 Iowa 432, Sec. 174.
- Roper vs. Sangamon Lodge No. 6, 91 Ill. 518, Sec. 15.
- Rose vs. Douglass Tp., 52 Kan. 451, Sec. 109, 124, 151, 166.
- vs. Williams, 5 Kan. 483, Sec. 83.
- vs. Wollenberg, 31 Ore. 269, Sec. 34, 265.
- Rosenbaum vs. Goodman, 78 Va. 121, Sec. 254, 263.
- Rosenthal vs. Davenport, 38 Minn. 543, Sec. 159.
- Ross vs. Ferris, 18 Hun 210, Sec. 186.
- vs. Menefee, 125 Ind. 432, Sec. 280.
- vs. Williamson, 44 Ga. 501, Sec. 150.
- vs. Wilson, 7 S. & M. (Miss.) 753, Sec. 255.
- Roth vs. Harkson, 18 La. Ann. 705, Sec. 259.
- Rotherham Alum & Chem. Co., In re, L. R., 25 Ch. Div. 103, Sec. 142.
- Rottman vs. Fix, 25 Mo. App. 571, Sec. 37.
- Rouse vs. Bradford Banking Co., L. R., 2 Ch. (1894) 32, Sec. 90.
- vs. Mohr, 29 Ill. App. 321, Sec. 16.
- Rouss vs. Creglow, 103 Iowa 60, Sec. 48.
- Rowan vs. Sharp's Rifle Mfg. Co., 33 Conn. 1, Sec. 73.
- Rowland vs. Mayor, 83 N. Y. 372, Sec. 145.
- Rowley vs. Howard, 23 Cal. 401, Sec. 147.
- vs. Jewett, 56 Iowa 492, Sec. 133.
- Rowell Mfg. Co. vs. Isaacs, 144 Mo. App. 58, Sec. 66.
- Royal Bank vs. Commercial Bank, L. R., 7 App. Cases 366, Sec. 256.
- Royal Co. vs. Davies, 40 Iowa 469, Sec. 119.
- Rubey Trust Co. vs. Weidner, 174 Mo. App. 692, Sec. 36.
- Rubush vs. State, 112 Ind. 107, Sec. 229.
- Rucker vs. Robinson, 38 Mo. 154, Sec. 92.
- Rucks vs. Taylor, 49 Miss. 552, Sec. 261.
- Rudesill vs. County Court of Jefferson Co., 85 Ill. 446, Sec. 151.

(References are to sections.)

- Rudolph vs. Malone, 104 Wis. 470, Sec. 23-a, 263.
 Rudy vs. Rudy, 145 Ky. 245, Sec. 224.
 vs. Wolf, 16 Serg. & R. 79, Sec. 6, 61.
 Ruffin vs. Harrison, 81 N. C. 208, Sec. 222.
 Ruffner vs. Love, 33 Ill. App. 601, Sec. 66.
 Ruggles vs. Gatton, 50 Ill. 412, Sec. 36.
 vs. Holden, 3 Wend. 216, Sec. 116.
 Rule vs. Anderson, 160 Mo. App. 347, Sec. 76-a.
 Rupert vs. People, 20 Colo. 424, Sec. 228.
 Russell vs. Annable, 109 Mass. 72, Sec. 104.
 vs. Ballard, 16 B. Mon. (Ky.) 201, Sec. 78.
 vs. Clark, 7 Cranch 69, Sec. 18, 50, 58, 65.
 vs. Failor, 1 O. S. 327, Sec. 103, 262, 275.
 vs. Farley, 105 U. S. 443, Sec. 179.
 vs. Freer, 56 N. Y. 67, Sec. 109, 127.
 Rutenberg vs. Main, 47 Cal. 213, Sec. 30.
 Rutland vs. Paige, 24 Vt. 181, Sec. 146.
 Rutherford vs. Moore, 24 Ind. 311, Sec. 196.
 Rutter vs. Hall, 31 Ill. App. 647, Sec. 222.
 Ryan vs. Krusor, 76 Mo. App. 496, Sec. 269.
 vs. Morton, 65 Tex. 258, Sec. 79.
 vs. Security Savings & Commercial Bank, 271 Fed. 366, Sec. 8.
 vs. Shawneetown, 14 Ill. 20, Sec. 77.
 vs. Tomlinson, 39 Cal. 639, Sec. 25.
 Ryndak vs. Seawell, 23 Okl. 759, Sec. 181, 183.

S

- Sabin vs. Harris, 12 Iowa 87, Sec. 67.
 Sabo vs. Nimett, 178 Ill. App. 459, Sec. 43.
 Sabrinos vs. Chamberlain, 76 Tex. 624, Sec. 221.
 Sacra vs. Hudson, 59 Tex. 207, Sec. 121.
 Sacramento Co. vs. Bird, 31 Cal. 66 Sec. 114, 152.
 Sacramento Lumber Co. vs. Wagner, 67 Cal. 293, Sec. 43.
 Sachs vs. American Sur. Co., 72 App. Div. 60, Sec. 137.
 Sadler vs. Hawkes, 1 Rolle Abr. 27, Pl. 49, Sec. 57.
 Saffold vs. Wade, 51 Ala. 214, Sec. 255.
 Sage vs. Wilcox, 6 Conn. 81, Sec. 27.
 Saginaw Medicine Co. vs. Batey, 179 Mich. 651, Sec. 15, 108.
 Saint vs. Wheeler, 95 Ala. 362, Sec. 6, 107, 144.
 Saline County vs. Buie, 65 Mo. 63, Sec. 98.
 Salisbury vs. First Nat. Bank, 37 Neb. 872, Sec. 10.
 vs. Keigher, 47 Minn. 367, Sec. 131.
 Salmon vs. Claggett, 3 Bland's Ch. (Md.) 125, Sec. 92.
 Salmon Falls Bank vs. Leyser, 116 Mo. 51, Sec. 281.
 Salmon Falls Mfg. Co. vs. Goddard, 14 How. U. S. 446, Sec. 29, 30.
 Salo vs. Pacific Coast Casualty Co., 95 Wash. 109, Sec. 135.
 Salyers vs. Ross, 15 Ind. 130, Sec. 219.
 Salter vs. Sutherland, 123 Mich. 225, Sec. 218.

(References are to sections.)

- Salt Lake County vs. Clinton, 39 Utah 462, Sec. 159.
 Salvin vs. Myles Realty Co., 227 N. Y. 51, Sec. 104.
 Sampson Co. vs. Commonwealth, 208 Mass. 372, Sec. 70.
 Samuell vs. Howarth, 3 Meriv. 272, Sec. 81.
 Samuels vs. Shelton, 48 Mo. 444, Sec. 147.
 Sanborn vs. Flagler, 9 Allen 474, Sec. 28, 30.
 Sanchez vs. Forster, 133 Cal. 614, Sec. 218.
 Sanders vs. Weelburg, 107 Ind. 266, Sec. 253, 273, 274.
 vs. Wettermark, 20 Tex. Civ. App. 175, Sec. 274.
 Sanderson vs. Aston, L. R., 8 Ex. 73, Sec. 73, 79, 107.
 Sandilands vs. Marsh, 2 Barn. & Ald. 673, Sec. 11.
 Sandoval vs. U. S. Fidelity & Guar. Co., 12 Ariz. 348, Sec. 187.
 Sanford vs. Willetts, 29 Kan. 647, Sec. 208.
 Sannes vs. Ross, 105 Ind. 558, Sec. 203.
 San Diego Water Co. vs. Pacific Coast S. S. Co., 101 Cal. 216, Sec. 197.
 San Francisco vs. Staude, 92 Cal. 560, Sec. 15, 106.
 San Luis Obispo Co. vs. Farnum, 108 Cal. 567, Sec. 163.
 Sapp vs. Aiken, 68 Iowa 699, Sec. 282.
 Sargent vs. Johns, 206 Pa. 386, Sec. 43.
 vs. Robbins, 19 N. H. 572, Sec. 10.
 vs. Salmond, 27 Me. 539, Sec. 248.
 vs. St. Mary's Orphan Boys' Asylum, 190 N. Y. 394, Sec. 197.
 vs. Wallis, 67 Tex. 483, Sec. 224.
 Sasscer vs. Young, 6 Gill. & Johns. (Md.) 243, Sec. 98.
 Sather Banking Co. vs. Briggs, 138 Cal. 724, Sec. 18.
 Satterfield vs. Spier, 114 Ga. 127, Sec. 1.
 Saunders vs. Wakefield, 4 Barn. & Ald. 505, Sec. 24, 26.
 Savage vs. First Nat. Bank, 112 Ala. 508, Sec. 9.
 vs. Fox, 60 N. H. 17, Sec. 16, 57.
 Savings Bank vs. Albee, 63 N. H. 152, Sec. 15, 106.
 vs. Chick, 64 N. H. 410, Sec. 94.
 vs. Shaffer, 9 Neb. 1, Sec. 74.
 Savings Bank of Hannibal vs. Hunt, 72 Mo. 507, Sec. 129.
 Sawyer vs. Chambers, 43 Barb. 622, Sec. 103.
 vs. Fernald, 59 Me. 500, Sec. 9.
 Sayels vs. Sims, 73 N. Y. 551, Sec. 264.
 Scarlett vs. Stein, 40 Md. 512, Sec. 29.
 Schafer vs. Farmers' & Mechanics' Bank, 59 Pa. St. 144, Sec. 10, 29.
 Schaefer vs. Henkel, 75 N. Y. 378, Sec. 142.
 Schram vs. Werner, 85 Hun 293, Sec. 263, 264.
 Schuff vs. Pflanz, 99 Ky. 97, Sec. 150.
 Schuylkill County vs. Copley, 67 Pa. St. 386, Sec. 15.
 Schureman vs. People, 55 Ill. App. 629, Sec. 174.
 Schuck vs. Hagar, 24 Minn. 339, Sec. 181.
 Schuster vs. Arena, 83 N. J. L. 79, Sec. 14.
 vs. Weiss, 114 Mo. 158, Sec. 186.
 Schmumcker vs. Steidemann, 8 Mo. App. 302, Sec. 182, 188.
 Schuyler vs. Sylvester, 28 N. J. L. 487, Sec. 202, 206.

(References are to sections.)

- Scheid vs. Leibschutz, 51 Ind. 38, Sec. 20.
 Schening vs. Cofer, 97 Ala. 726, Sec. 197.
 Schwartz vs. Hyman, 107 N. Y. 562, Sec. 59.
 vs. Smith, 128 N. Y. S. 1, Sec. 82.
 Schunack vs. Art Metal Novelty Co., 84 Conn. 331, Sec. 201.
 Schultz vs. U. S. Fidelity & Guar. Co., 20 N. Y. 230, Sec. 185.
 Schoonover vs. Allen, 40 Ark. 132, Sec. 245, 249.
 vs. Osborne, 108 Iowa 453, Sec. 52.
 Schneider vs. Norris, 2 Manl. & Sel. 286, Sec. 30.
 vs. Schiffman, 20 Mo. 571, Sec. 8, 9, 10.
 vs. Wallingford, 4 Col. App. 150, Sec. 201.
 Schnitzel's Appeal, 49 Pa. 23, Sec. 246.
 Schmeckel Cloak & Suit Co., In re, 3 Nat. B. News 110, Sec. 252.
 Schreiber vs. Wonn, 164 Ind. 7, Sec. 76-a.
 Schroepell vs. Shaw, 3 N. Y. 446, Sec. 99.
 Schroeder vs. Turner, 68 Md. 506, Sec. 10.
 Scholze vs. Steiner, 100 Ala. 148, Sec. 117.
 Schlageck vs. Widholm, 59 Neb. 541, Sec. 133.
 Schleissman vs. Kallenberg, 72 Iowa 338, Sec. 249.
 Schirott vs. Philippi, 3 Ore. 484, Sec. 180.
 School District vs. Lapping, 100 Minn. 139, Sec. 122.
 vs. Massachusetts Bonding Co., 92 Ky. 53, Sec. 240.
 vs. Smith, 63 Ore. 586, Sec. 78.
 Scofield vs. Churchill, 72 N. Y. 565, Sec. 218.
 vs. Gaskill, 60 Ga. 277, Sec. 268.
 Scott vs. Ellitt, 63 N. C. 215, Sec. 212.
 vs. Hall, 6 B. Mon. (Ky.) 285, Sec. 83.
 vs. Milton, 26 Fla. 52, Sec. 181.
 vs. Patchin, 54 Vt. 253, Sec. 248.
 vs. Phillips, 140 Pa. 51, Sec. 135.
 vs. Saffold, 37 Ga. 384, Sec. 83.
 vs. Timberlake, 83 N. C. 382, Sec. 281.
 vs. White, 71 Ill. 287, Sec. 41.
 Scott's Appeal, 88 Pa. 173, Sec. 251.
 Scott Co. vs. Fluke, 34 Iowa 317, Sec. 170.
 vs. Ring, 29 Minn. 398, Sec. 156.
 Scotten vs. Fegan, 62 Iowa 236, Sec. 171.
 Scoville Manf. Co. vs. Cassidy, 275 Ill. 463, Sec. 58.
 Screwman's Benev. Assn. vs. Smith, 70 Tex. 168, Sec. 15.
 Scribner vs. Adams, 73 Me. 541, Sec. 244, 253, 274.
 Scroggin vs. Holland, 16 Mo. 419, Sec. 103, 117.
 Seaboard Air Line vs. Hewlett, 94 S. C. 478, Sec. 212.
 Seaman vs. Slater, 18 Fed. Rep. 485, Sec. 69.
 Sears vs. Brink, 3 Johns. 210, Sec. 27.
 Seaver vs. Pierce, 42 Vt. 325, Sec. 173.
 Seavey vs. Beckler, 132 Mass. 203, Sec. 206.
 Seattle Crockery Co. vs. Haley, 6 Wash. 302, Sec. 200, 205, 208.
 Searing vs. Berry, 58 Iowa 20, Sec. 249.

(References are to sections.)

- Seat vs. Cannon, 20 Tenn. 471, Sec. 221.
 Sebald vs. Citizens Deposit Bank, 31 Ky. Law Rep. 1244, Sec. 15.
 Second National Bank vs. Hill, 76 Ind. 223, Sec. 101.
 vs. American Bonding Co., 93 O. S. 362, Sec. 284.
 vs. Wentzel, 151 Pa. 142, Sec. 97.
 Security Ins. Co. vs. Aetna Indemnity Co., 108 N. Y. Supp. 171, Sec. 242.
 vs. St. Paul Ins. Co., 50 Conn. 233, Sec. 271, 273.
 Sedgwick vs. Dawkins, 15 Fla. 572, Sec. 181.
 Seegar's Exrs. vs. State, 5 Har. & J. (Md.) 488, Sec. 220.
 Sefton vs. Hargett, 113 Ind. 592, Sec. 117.
 Seffes vs. Lamke, 40 Minn. 27, Sec. 131.
 Segari vs. Mazzei, 116 La. 1026, Sec. 76-a.
 Seitz Brewing Co. vs. Ayres, 60 N. J. E. 190, Sec. 109.
 Seidenbender vs. Charles' Adm., 4 S. & R. 151, Sec. 156.
 Seibert vs. True, 8 Kas. 52, Sec. 255.
 Seixas vs. Gonsonlin, 40 La. Ann. 351, Sec. 251.
 Selby vs. City of New Orleans, 119 La. 900, Sec. 122.
 Sellers vs. Territory, 32 Okl. 147, Sec. 23-a.
 Seligman vs. Gray, 66 Mich. 341, Sec. 114.
 Sensenig vs. Parry, 113 Pa. 115, Sec. 197, 213.
 Sepp vs. McCann, 47 Minn. 364, Sec. 131.
 Seufert vs. Gille, 230 Mo. 453, Sec. 11.
 Sewell vs. Breathitt Lodge, 150 Ky. 542, Sec. 15, 106, 108.
 Seymour vs. Mickey, 15 O. S. 515, Sec. 8, 9, 112.
 vs. Oelrichs, 156 Cal. 782, Sec. 29.
 Shapleigh Hardware Co. vs. Wells, 90 Tex. 110, Sec. 23.
 Sharkey vs. McDermott, 91 Mo. 647, Sec. 45.
 Shakman vs. Credit System Co., 92 Wis. 366, Sec. 233, 235.
 Shaffstall vs. McDaniel, 152 Pa. 598, Sec. 82.
 Sharp vs. Allgood, 100 Ala. 183, Sec. 108.
 vs. United States, 4 Watts (Pa.) 21, Sec. 111.
 Sharpe vs. Harding, 65 Mo. App. 28, Sec. 193.
 vs. Hunter, 16 Ala. 765, Sec. 203.
 vs. Smith, 59 Ga. 707, Sec. 231.
 vs. Speckenagle, 3 Serg. & R. 463, Sec. 100.
 Shackamaxon Bank vs. Yard, 143 Pa. 129, Sec. 119.
 Shattuck vs. Adams, 136 Mass. 34, Sec. 135.
 Sharon vs. Hill, 26 Fed. Rep. 337, Sec. 180.
 Shannon vs. Dodge, 18 Col. 164, Sec. 187, 189.
 Shaeffer vs. Clendenin, 100 Pa. 565, Sec. 253.
 Shay vs. Cruxton, 116 N. Y. Supp. 1123, Sec. 36.
 Sheard vs. U. S. Fidelity & Guaranty Co., 58 Wash. 29, Sec. 131.
 Shepard vs. Pebbles, 38 Wis. 373, Sec. 226, 268.
 Sheppard vs. Collins, 12 Iowa 570, Sec. 199.
 vs. Daniel Miller Co., 7 Ga. App. 760, Sec. 66, 77.
 vs. Newton, 139 N. C. 533, Sec. 38.
 Sherman vs. Black, 49 Vt. 198, Sec. 264.
 vs. Foster, 158 N. Y. 587, Sec. 274.
 vs. Harbin, 125 Iowa 174, Sec. 15, 106.
 Sherman's Admr. vs. Shaver, 75 Va. 1, Sec. 253, 254.

(References are to sections.)

- Sherman County vs. Nichols, 65 Neb. 250, Sec. 88, 114.
 Shepherd vs. May, 115 U. S. 505, Sec. 23, 90.
 Sherwood vs. Stone, 14 N. Y. 267, Sec. 44.
 Sherry vs. Miller, 7 Lea 305, Sec. 99.
 Sherrell vs. Goodrum, 3 Humph. 419, Sec. 157.
 Sheldon vs. Davidson, 85 Wis. 138, Sec. 110.
 vs. Hill, 33 Mich. 171, Sec. 168.
 vs. Van Buskirk, 2 N. Y. 473, Sec. 172.
 vs. Williams, 11 Neb. 272, Sec. 99.
 Shelton vs. Smith, 62 Tenn. 82, Sec. 224.
 vs. State, 53 Ind. 331, Sec. 160.
 Shenandoah Bank vs. Ayres, 87 Iowa 526, Sec. 115.
 Shelby vs. Alcorn, 36 Miss. 273, Sec. 145.
 Sheffield vs. Whitfield, 6 Ga. App. 762, Sec. 66.
 Shevlin vs. Whelen, 41 Wis. 88, Sec. 202.
 Shieber vs. Traudt, 19 Ind. App. 349, Sec. 83.
 Shipman vs. Brown, 36 Okl. 623, Sec. 221.
 Shine's Admr. vs. Central Savings Bank, 70 Mo. 524, Sec. 17, 50.
 Shields vs. Titus, 46 O. S. 528, Sec. 45.
 Shickle Iron Co. vs. Water Works Co., 83 Iowa 396, Sec. 50.
 Shipp's Adm. vs. Suggett's Adm., 9 B. Mon. 5, Sec. 75.
 Shimer vs. Hightshue, 7 Black. (Ind.) 238, Sec. 186.
 Shinn vs. Shinn, 91 Ill. 477, Sec. 251.
 Shook vs. Vanmater, 22 Wis. 532, Sec. 31.
 Shows vs. Pendry, 93 Ala. 248, Sec. 188.
 vs. Steiner, 175 Ala. 363, Sec. 66.
 Shores-Mueller Co. vs. Knox, 141 N. W. 948, Sec. 67.
 Shreffler vs. Nadelhoffer, 133 Ill. 536, Sec. 194.
 Shreve vs. Hankinson, 34 N. J. Eq. 76, Sec. 260.
 Shrewsbury Savings Institution's Appeal, 94 Pa. 309, Sec. 140.
 Shriver vs. Lovejoy, 32 Cal. 574, Sec. 112.
 vs. Reister, 65 Md. 278, Sec. 217.
 Shultz vs. Morrison, 60 Ky. 98, Sec. 208.
 Shumway vs. Reed, 34 Me. 560, Sec. 140.
 Shupe vs. Galbraith, 32 Pa. 10, Sec. 57.
 Shutts vs. Fingar, 100 N. Y. 539, Sec. 100.
 Shuford vs. Cook, 80 S. E. 61, Sec. 267.
 Sibley vs. McAllaster, 8 N. H. 389, Sec. 284.
 vs. Williams, 3 Gill. & Johns. (Md.) 52, Sec. 25.
 Sichel vs. Carrillo, 42 Cal. 493, Sec. 95.
 Sigourney vs. Wetherell, 6 Met. 553, Sec. 66, 86, 94, 96.
 Silsbe vs. Lucas, 53 Ill. 479, Sec. 196.
 Sime vs. Lewis, 128 N. W. 468, Sec. 90.
 Simmons vs. Sharp, 2 Ala. App. 385, Sec. 183, 188.
 Simons vs. Steel, 36 N. H. 73, Sec. 50.
 Simons & Co. vs. McDowell, 125 Ga. 203, Sec. 74.
 Simmons vs. Camp, 71 Ga. 54, Sec. 268, 274.

(References are to sections.)

- Simpson** vs. Comm., 31 Ky. 523, Sec. 231.
 vs. Hall, 47 Conn. 417, Sec. 25.
 vs. Henning, L. R., 10 Q. B. 406, Sec. 100.
 vs. Nance, 1 Spears (S. C.) 4, Sec. 34.
 vs. Penton, 2 Crompt. & Mees. 430, Sec. 36.
 vs. Vaughan, 2 Atk. 31, Sec. 69, 119.
Simson vs. Brown, 68 N. Y. 355, Sec. 131.
 vs. Cooke, 8 Moore 588, Sec. 54.
Simonds vs. Heinn, 22 La. Ann. 296, Sec. 186
Simonson vs. Grant, 36 Minn. 439, Sec. 79.
Simeon vs. Cram, 121 Mass. 492, Sec. 206.
Sims vs. Harris, 47 Ky. 55, Sec. 143.
 vs. Wallace, 6 B. Mon. (Ky.) 410, Sec. 281.
Sinclair vs. National Surety Co., 132 Iowa 549, Sec. 230.
Singer Mfg. Co. vs. Bennett, 28 W. Va. 16, Sec. 264.
 vs. Boyette, 74 Ark. 600, Sec. 76.
 vs. Forsyth, 108 Ind. 334, Sec. 126.
 vs. Draghan, 121 N. C. 88, Sec. 71.
 vs. Littler, 56 Iowa 601, Sec. 5.
 vs. Ponder, 82 Tex. 653, Sec. 144.
Sipe vs. Taylor, 106 Va. 231, Sec. 245.
Sitgreaves vs. Farmers Bank, 49 Pa. 359, Sec. 90.
Sjoli vs. Hogenson, 19 N. D. 82, Sec. 221.
Skillett vs. Fletcher, 1 L. R. C. P. 217, Sec. 152.
Skinker vs. Armstrong, 86 Va. 1011, Sec. 43.
Skinner vs. Tirrel, 150 Mass. 474, Sec. 259.
Skipwith vs. Hurt, 94 Tex. 322, Sec. 248.
Skrainka vs. Rohan, 18 Mo. App. 340, Sec. 275.
Slack vs. Kirke, 67 Pa. St. 380, Sec. 259.
Slagle vs. Entrekin, 44 O. S. 637, Sec. 221.
Slattery vs. Schapero, 217 Mass. 71, Sec. 177.
Sledge vs. Lee, 19 Ga. 411, Sec. 198.
Sleigh vs. Sleigh, 5 Ex. 514, Sec. 285.
Sloan vs. Gibbes, 56 S. C. 480, Sec. 269, 272.
 vs. Langert, 6 Wash. 26, Sec. 205.
Sloo vs. Pool, 15 Ill. 47, Sec. 269.
Small Co. vs. Claxton, 1 Ga. App. 83, Sec. 18, 50, 59.
Smith vs. Allen, 1 N. J. Eq. 43, Sec. 17.
 vs. American Bonding Co., 160 N. C. 574, Sec. 225.
 vs. Austin, 9 Mich. 465, Sec. 259.
 vs. Bland, 46 Ky. 21, Sec. 218.
 vs. Butler, 25 N. H. 521, Sec. 122.
 vs. Conrad, 15 La. Ann. 579, Sec. 274.
 vs. Cuyler, 78 Ga. 654, Sec. 217.
 vs. Dann, 6 Hill 543, Sec. 66.
 vs. Davis, 76 S. E. 670, Sec. 249.
 vs. Eakin, 2 Sneed (Tenn.) 456, Sec. 198, 200.
 vs. Easter, 101 Kan. 245, Sec. 122.
 vs. Easton, 54 Md. 138, Sec. 30.

(References are to sections.)

- Smith vs. Erwin, 77 N. Y. 466, Sec. 99.
 vs. Exchange Bank, 5 Ga. App. 139, Sec. 85.
 vs. First National Bank of London, 107 Ky. 257, Sec. 15.
 vs. Freyler, 4 Mont. 489, Sec. 115.
 vs. Gillam, 80 Ala. 296, Sec. 95.
 vs. Gregory, 26 Gratt. (Va.) 248, Sec. 222.
 vs. Gummere, 39 N. J. Eq. 27, Sec. 224.
 vs. Harbin, 124 Ind. 434, Sec. 261.
 vs. Hughes, 24 Ill. 270, Sec. 187.
 vs. Hyde, 36 Vt. 303, Sec. 83.
 vs. Ide, 3 Vt. 290, Sec. 27.
 vs. Jackson, 97 Iowa 112, Sec. 140.
 vs. Jones, 76 Me. 138, Sec. 172.
 vs. Keniston, 100 Mass. 172, Sec. 172.
 vs. Kirkland, 81 Ala. 345, Sec. 111, 127.
 vs. Kitchens, 51 Ga. 158, Sec. 232.
 vs. Kuhl, 26 N. J. Eq. 97, Sec. 192.
 vs. Latimer, 15 B. Mon. (Ky.) 75, Sec. 248.
 vs. Lisher, 23 Ind. 500, Sec. 213.
 vs. Mason, 44 Neb. 610, Sec. 269, 271, 272.
 vs. Miller, 152 Ala. 485, Sec. 36.
 vs. Moberly, 10 B. Mon. (Ky.) 266, Sec. 111.
 vs. Molleson, 148 N. Y. 241, Sec. 50, 76-b, 126.
 vs. Montgomery, 3 Tex. 199, Sec. 50, 52.
 vs. Moore, 90 Ind. 294, Sec. 145.
 vs. Morrill, 54 Me. 48, Sec. 278.
 vs. Old Dominion Bldg. Assn., 119 N. C. 257, Sec. 96.
 vs. People, 67 Colo. 452, Sec. 232.
 vs. Rumsey, 33 Mich. 183, Sec. 249, 270.
 vs. Sayward, 5 Me. 504, Sec. 279.
 vs. Sheldon, 35 Mich. 42, Sec. 23, 90.
 vs. State, 46 Md. 617, Sec. 114, 269.
 vs. State, 10 Wyo. 157, Sec. 59.
 vs. State, 12 Neb. 309, Sec. 232.
 vs. Steele, 25 Vt. 427, Sec. 80.
 vs. United States, 2 Wall. 219, Sec. 74, 153.
 vs. U. S. Express Co., 135 Ill. 279, Sec. 202.
 vs. Whitaker, 11 Ill. 417, Sec. 181.
 vs. Whiting, 100 Mass. 122, Sec. 212.
 vs. Young, 173 Ala. 190, Sec. 280.
 vs. Zimmer, 45 Mont. 282, Sec. 158.
 Smith's Executors vs. Anderson, 18 Md. 520, Sec. 262.
 Smith Bros. vs. Miller, 152 Ala. 485, Sec. 38.
 Smithwick vs. Kelly, 79 Tex. 564, Sec. 181.
 Snaith vs. Smith, 27 N. Y. S. 379, Sec. 76-h.
 Snodgrass vs. Shader, 168 S. W. 567, Sec. 79.
 Snow vs. Brown, 100 Ga. 117, Sec. 23-a.
 vs. Horgan, 18 R. I. 289, Sec. 115.

(References are to sections.)

- Snyder vs. Click, 112 Ind. 293, Sec. 66.
 vs. State, 5 Wyo. 318, Sec. 119.
- Society vs. Fitzwilliams, 84 Mo. 406, Sec. 174.
- Sohier vs. Lohring, 6 Cush. 537, Sec. 92.
- Solary vs. Stultz, 22 Fla. 263, Sec. 56, 82, 96.
- Sooy vs. State, 39 N. J. Law 135, Sec. 15, 106, 146, 174.
- Sosman vs. Conklin, 65 Mo. App. 319, Sec. 188.
- Sotheren vs. Reed, 4 Harr. & J. (Md.) 307, Sec. 240.
- Southern Cotton Oil Co. vs. Bass, 126 Ala. 343, Sec. 108.
 vs. Napoleon Hill Cotton Co., 108 Ark. 555, Sec. 244.
- Southern Surety Co. vs. Burney, 34 Okl. 552, Sec. 224, 226.
- South Berwick vs. Huntress, 53 Me. 89, Sec. 20, 109, 124.
- Southwestern Surety Co. vs. U. S. F. & G. Co., 75 Okla. 232, Sec. 180.
- Spaulding vs. Andrews, 48 Pa. 411, Sec. 42.
- Sparks vs. Farmers' Bank, 3 Del. Ch. 274, Sec. 141.
- Spain vs. Clements, 63 Ga. 786, Sec. 159.
- Spangler vs. Sheffer, 69 Pa. 255, Sec. 257.
- Spear vs. Farmers' & Mech. Bank, 156 Ill. 555, Sec. 32
 vs. Stacy, 26 Vt. 61, Sec. 135.
- Speed vs. Common Council, 97 Mich. 198, Sec. 148.
- Spencer vs. Almoney, 56 Md. 551, Sec. 117.
 vs. Allerton, 60 Conn. 410, Sec. 10, 112.
 vs. Handley, 5 Scott N. R. 546, Sec. 15, 127.
 vs. Houghton, 68 Cal. 82, Sec. 114.
 vs. McLean, 20 Ind. App. 626, Sec. 123.
- Sperb vs. McCoun, 110 N. Y. 605, Sec. 223.
- Speyer vs. Desjardins, 144 Ill. 641, Sec. 45.
- Sperry vs. Dransfield, 2 New Zealand, S. C. 319, Sec. 130.
- Spies vs. Gilmore, 1 N. Y. 321, Sec. 8.
- Spokane & I. Lumber Co. vs. Loy, 21 Wash. 501, Sec. 137.
- Sponhaur vs. Malloy, 21 Ind. App. 287, Sec. 284.
- Springfield Lighting Co. vs. Hobart, 98 Mo. App. 227, Sec. 78.
- Spring Garden Ins. Co. vs. Lenmon, 117 Iowa 691, Sec. 109.
- Springer vs. Dwyer, 50 N. Y. 19, Sec. 258.
- Springer Litho. Co. vs. Graves, 97 Iowa 39, Sec. 94.
- Springs vs. McCoy, 122 N. C. 628, Sec. 279.
- Sprague vs. Wells, 47 Minn. 504, Sec. 135, 143.
- Sproat vs. Comm., 4 Ky. L. Rep. 929, Sec. 231.
- Spurgeon vs. Smitha, 114 Ind. 453, Sec. 96.
- Spurlock vs. Earles, 67 Tenn. 437, Sec. 218.
- Spycher vs. Werner, 74 Wis. 456, Sec. 97.
- State vs. Adams, 40 Tenn. 259, Sec. 231.
 vs. Alden, 12 O. 59, Sec. 96.
 vs. Allen, 33 Ala. 422, Sec. 230.
 vs. Allen, 21 Tenn. 258, Sec. 232.
 vs. Allen, 60 Miss. 508, Sec. 109.
 vs. Anderson, 81 Tenn. 321, Sec. 222.
 vs. Andrews, 39 W. Va. 35, Sec. 208.

(References are to sections.)

- State vs. Ansley, 13 La. Ann. 298, Sec. 229.
 vs. Atherton, 40 Mo. 201, Sec. 114, 129, 135.
 vs. Aubrey, 43 La. Ann. 188, Sec. 229.
 vs. Banks, 48 Md. 513, Sec. 144.
 vs. Barrett, 121 Ind. 92, Sec. 218, 222.
 vs. Beard, 34 La. Ann. 273, Sec. 150.
 vs. Beckner, 132 Ind. 371, Sec. 164.
 vs. Bell, 116 Ind. 1, Sec. 145.
 vs. Bennett, 24 Ind. 383, Sec. 144.
 vs. Benton, 48 N. H. 551, Sec. 111.
 vs. Benzion, 79 Iowa 467, Sec. 229.
 vs. Berg, 50 Ind. 496, Sec. 151.
 vs. Berning, 74 Mo. 87, Sec. 219, 221.
 vs. Bilby, 50 Mo. App. 162, Sec. 224.
 vs. Binney, 127 Mo. App. 710, Sec. 208.
 vs. Blake, 2 O. S. 147, Sec. 95.
 vs. Blanchard Construction Co., 91 Kas. 74, Sec. 19.
 vs. Boring, 15 O. 507, Sec. 109.
 vs. Bonner, 72 Mo. 387, Sec. 163.
 vs. Branch, 134 Mo. 592, Sec. 222, 225.
 vs. Brantley, 27 Ala. 44, Sec. 14.
 vs. Breen, 6 S. D. 537, Sec. 229.
 vs. Broome, 61 N. J. L. 115, Sec. 145.
 vs. Brown, 16 Iowa, 314, Sec. 230.
 vs. Brown, 54 Md. 318, Sec. 165.
 vs. Brown, 11 Ired. (N. C.) 141, Sec. 165.
 vs. Brown, 80 Ind. 425, Sec. 217.
 vs. Burnham, 44 Me. 278, Sec. 231.
 vs. Bryant, 55 Iowa 451, Sec. 231.
 vs. Bus, 135 Mo. 325, Sec. 147.
 vs. Caldwell, 124 Mo. 509, Sec. 228.
 vs. Campbell, 10 Mo. 724, Sec. 223.
 vs. Carleton, 1 Gill. (Md.) 249, Sec. 87.
 vs. Carrick, 70 Md. 586, Sec. 169.
 vs. Casey (S. D.), 183 N. W. 971, Sec. 232.
 vs. Cason, 11 S. C. 392, Sec. 176.
 vs. Causey, 93 S. C. 300, Sec. 156.
 vs. Chadwick, 10 Oreg. 465, Sec. 159.
 vs. Cheston, 51 Md. 352, Sec. 222.
 vs. Churchill, 41 Mo. 42, Sec. 150.
 vs. Churchill, 48 Ark. 426, Sec. 109.
 vs. Clarke, 73 N. C. 255, Sec. 167.
 vs. Clarke, 21 Nev. 333, Sec. 145.
 vs. Cobb, 71 Me. 198, Sec. 231.
 vs. Colvig, 15 Oreg. 57, Sec. 150.
 vs. Cone, 32 Ga. 663, Sec. 232.
 vs. Conover, 28 N. J. L. 224, Sec. 165.
 vs. Conway, 18 O. 234, Sec. 95.

(References are to sections.)

- State** vs. Copeland, 96 Tenn. 290, Sec. 166.
 vs. Coste, 36 Mo. 437, Sec. 103.
 vs. County Court, 44 Mo. 230, Sec. 150.
 vs. Craig, 58 Iowa 238, Sec. 74.
 vs. Creusbauer, 68 Mo. 254, Sec. 221.
 vs. Crooks, 7 O. (pt. 2) 221, Sec. 158.
 vs. Crowley, 60 Me. 103, Sec. 231.
 vs. Cunningham, 10 La. Ann. 393, Sec. 232.
 vs. Dent, 121 Mo. 162, Sec. 111.
 vs. Doane, 35 Neb. 707, Sec. 180.
 vs. Drake, 40 Okl. 538, Sec. 231.
 vs. Dunn, 60 Mo. 64, Sec. 210.
 vs. Dunn, 11 La. Ann. 549, Sec. 75.
 vs. Dunnington, 12 Md. 340, Sec. 148.
 vs. Elliott, 157 Mo. 609, Sec. 218.
 vs. Emily, 24 Iowa 24, Sec. 231.
 vs. Falconer, 44 Ala. 696, Sec. 150.
 vs. Farmer, 21 Mo. 160, Sec. 164.
 vs. Felton, 59 Miss. 402, Sec. 154.
 vs. Findley, 101 Mo. 368, Sec. 12.
 vs. Findley, 10 O. 51, Sec. 21.
 vs. Finn, 23 Mo. App. 290, Sec. 158.
 vs. Fitzpatrick, 64 Mo. 185, Sec. 164.
 vs. Flinn, 77 Ala. 100, Sec. 148.
 vs. Forno, 14 La. Ann. 450, Sec. 231.
 vs. Frank, 51 Mo. 98, Sec. 17.
 vs. Fnnk, 20 N. D. 145, Sec. 232.
 vs. Gage, 52 Mo. App. 464, Sec. 208.
 vs. Gilbert, 10 La. Ann. 532, Sec. 228.
 vs. Graham, 68 W. Va. 1, Sec. 197.
 vs. Gramm, 7 Wyo. 329, Sec. 166.
 vs. Gregory, 119 Ind. 503, Sec. 218.
 vs. Griffith, 74 O. S. 80, Sec. 163.
 vs. Harbridge, 43 Mo. App. 16, Sec. 224.
 vs. Harney, 57 Miss. 863, Sec. 146, 151, 172.
 vs. Harper, 6 O. S. 607, Sec. 167.
 vs. Harrington, 41 Mo. App. 439, Sec. 139.
 vs. Heckart, 62 Mo. App. 427, Sec. 208.
 vs. Heisey, 56 Iowa 404, Sec. 146.
 vs. Hendricks, 40 La. Ann. 719, Sec. 228.
 vs. Hewitt, 72 Mo. 603, Sec. 108.
 vs. Hill, 47 Neb. 456, Sec. 166.
 vs. Holman, 96 Mo. App. 193, Sec. 76.
 vs. Holt, 145 N. C. 450, Sec. 229.
 vs. Horn, 70 Mo. 466, Sec. 232.
 vs. Homey, 44 Wis. 615, Sec. 188.
 vs. Hoster, 61 Mo. 544, Sec. 226.

(References are to sections.)

- State vs. Houston, 78 Ala. 576, Sec. 169.
 vs. Humbird, 54 Md. 327, Sec. 134.
 vs. Ingram, 27 N. C. 441, Sec. 123.
 vs. James, 82 Mo. 509, Sec. 217, 218.
 vs. Jefferson, 66 N. C. 309, Sec. 147.
 vs. Jennings, 14 O. S. 73, Sec. 176.
 vs. Jennings, 57 O. S. 415, Sec. 145.
 vs. Johnson, 55 Mo. 80, Sec. 154.
 vs. Johnson, 4 Wall. 498, Sec. 168.
 vs. Judge of Superior Dist. Ct., 28 La. Ann. 547, Sec. 180.
 vs. Keim, 8 Neb. 63, Sec. 160.
 vs. Kennon, 7 O. S. 546, Sec. 145.
 vs. Kyle, 99 Ala. 256, Sec. 231.
 vs. Lanier, 31 La. Ann. 423, Sec. 167.
 vs. Lansing, 46 Neb. 514, Sec. 150.
 vs. Lay, 128 Mo. 609, Sec. 229.
 vs. Leeds, 31 N. J. L. 185, Sec. 175.
 vs. Lingerfelt, 109 N. C. 775, Sec. 232.
 vs. Livingston, 117 Mo. 627, Sec. 231.
 vs. McFetridge, 84 Wis. 473, Sec. 160.
 vs. McDonough, 9 Mo. App. 63, Sec. 164.
 vs. McGlothlin, 61 Iowa 312, Sec. 204.
 vs. McGonigle, 101 Mo. 353, Sec. 74.
 vs. McGuire, 16 R. I. 519, Sec. 231.
 vs. McKeon, 25 Mo. App. 667, Sec. 258.
 vs. McNally, 34 Me. 210, Sec. 172.
 vs. McNeal, 18 N. J. L. 333, Sec. 232.
 vs. Mackie, 82 Conn. 398, Sec. 145.
 vs. Mankin, 68 W. Va. 772, Sec. 165.
 vs. Mann, 34 Vt. 371, Sec. 129, 153.
 vs. Matson, 44 Mo. 305, Sec. 114.
 vs. May, 106 Mo. 488, Sec. 145.
 vs. Meagher, 44 Mo. 356, Sec. 166.
 vs. Medary, 17 O. 554, Sec. 2, 17, 50, 122.
 vs. Merrihew, 47 Iowa 112, Sec. 231.
 vs. Millsaps, 69 Mo. 359, Sec. 231.
 vs. Moore, 56 Neb. 82, Sec. 163.
 vs. Moore, 74 Mo. 413, Sec. 166.
 vs. Morgan, 124 Mo. 467, Sec. 231.
 vs. Morrison, 244 Mo. 193, Sec. 218.
 vs. Moses, 18 S. C. 366, Sec. 158.
 vs. Murmann, 124 Mo. 502, Sec. 232.
 vs. Nash, 79 S. E. 829, Sec. 197.
 vs. Nevin, 19 Nev. 162, Sec. 166.
 vs. Nicol, 30 La. Ann. 628, Sec. 228.
 vs. O'Keefe, 32 Nev. 331, Sec. 231.
 vs. Orsler, 48 Iowa 343, Sec. 232.

(References are to sections.)

- State vs. Parker, 72 Ala. 181, Sec. 102, 103.
 vs. Paxton, 65 Neb. 110, Sec. 75, 126.
 vs. Peck, 53 Me. 284, Sec. 15, 74, 111.
 vs. Peckham, 136 Ind. 198, Sec. 226.
 vs. Pepper, 31 Ind. 76, Sec. 20.
 vs. Polk, 14 Lea (Tenn.) 1, Sec. 146.
 vs. Porter, 69 Neb. 203, Sec. 163.
 vs. Porter, 9 Mo. 356, Sec. 220.
 vs. Poston, 63 Mo. 521, Sec. 231.
 vs. Potter, 63 Mo. 212, Sec. 74.
 vs. Powell, 40 La. Ann. 234, Sec. 156.
 vs. Powers, 52 Miss. 198, Sec. 144.
 vs. Purcell, 31 W. Va. 44, Sec. 21.
 vs. Reid, 6 Cal. A. 686, Sec. 248.
 vs. Rhodes, 6 Nev. 352, Sec. 174.
 vs. Ridgley, 10 La. Ann. 302, Sec. 231.
 vs. Roberts, 12 N. J. L. 114, Sec. 157.
 vs. Roberts, 68 Mo. 234, Sec. 87.
 vs. Rosswaag, 3 Mo. App. 11, Sec. 226.
 vs. Row, 89 Iowa 581, Sec. 232.
 vs. Ruff, 4 Wash. 234, Sec. 150.
 vs. Rush Co. Comrs., 35 Kan. 150, Sec. 192.
 vs. Sappington, 67 Mo. 529, Sec. 158.
 vs. Schexneider, 45 La. Ann. 1445, Sec. 231.
 vs. Scott, 20 Iowa 63, Sec. 231, 232.
 vs. Shackelford, 56 Miss. 648, Sec. 224.
 vs. Shelvin Carpenter Co., 62 Minn. 99, Sec. 215.
 vs. Shobe, 23 Mo. App. 474, Sec. 208.
 vs. Sixth Judicial Dist. Ct., 22 Mont. 449, Sec. 183.
 vs. Slauter, 50 Ind. 597, Sec. 226.
 vs. Smith, 66 N. C. 620, Sec. 229.
 vs. Smith, 145 N. C. 476, Sec. 145.
 vs. Sooy, 39 N. J. L. 539, Sec. 156.
 vs. Spaulding, 102 Iowa 639, Sec. 145.
 vs. Sureties of Krohne, 4 Wyo. 347, Sec. 231.
 vs. Suwannee Co. Commissioners, 21 Fla. 1, Sec. 123.
 vs. Swinney, 60 Miss. 39, Sec. 87.
 vs. Taylor, 67 W. Va. 585, Sec. 197.
 vs. Tiedemann, 69 Mo. 515, Sec. 125.
 vs. Toomer, 7 Rich. Law Rep. (S. C.) 216, Sec. 150.
 vs. Tucker, 54 Ala. 205, Sec. 150.
 vs. U. S. Fidelity & Guaranty Co., 81 Kas. 660, Sec. 12, 19.
 vs. Wakely, 28 Neb. 431, Sec. 192.
 vs. Walsen, 17 Col. 170, Sec. 160.
 vs. Walsh, 67 Mo. App. 348, Sec. 218.
 vs. Watts, 100 O. S. 380, Sec. 131.
 vs. Whitehouse, 80 Conn. 111, Sec. 222.
 vs. Williford, 104 Kan. 221, Sec. 231.
 vs. Wilson, 29 O. S. 347, Sec. 145.

(References are to sections.)

- State** vs. Wooten, 4 La. Ann. 515, Sec. 231.
 vs. Yates, 231 Mo. 276, Sec. 17.
 vs. Young, 23 Minn. 551, Sec. 154.
 vs. Young, 20 La. Ann. 397, Sec. 230.
State Lunatic Asylum vs. Douglas, 77 Mo. 647, Sec. 20.
State Bank vs. Bartle, 114 Mo. 276, Sec. 99.
 vs. Burton-Gardner Co., 14 Utah 420, Sec. 111.
 vs. Chetwood, 8 N. J. L. 1, Sec. 134.
 vs. Peoples Nat. Bank, 118 N. Y. Supp. 641, Sec. 43.
 vs. Smith, 155 N. Y. 185, Sec. 98, 244.
Standard Oil Co. vs. Holmes, 82 Ill. App. 476, Sec. 127.
Standard Underground Cable Co. vs. Stone, 54 N. Y. S. 383, Sec. 76.
Stanford vs. Connery, 84 Ga. 731, Sec. 282.
Staver Carriage Co. vs. Jones, 32 Okl. 713, Sec. 43.
Stauber vs. Ellett, 140 Mich. 271, Sec. 126.
Stanley vs. McElrath, 86 Cal. 449, Sec. 282, 285.
 vs. Miles & Adams, 36 Miss. 434, Sec. 16.
 vs. Western Ins. Co., L. R., 3 Ex. 71, Sec. 49.
Stariha vs. Greenwood, 28 Minn. 521, Sec. 43.
Starry vs. Johnson, 32 Ind. 438, Sec. 114.
Stallings vs. Bank, 59 Ga. 701, Sec. 98.
Stallworth vs. Preslar, 34 Ala. 505, Sec. 269.
Stark vs. Raney, 18 Cal. 622, Sec. 139.
Staley vs. Howard, 7 Mo. App. 377, Sec. 187.
Stanton vs. State, 82 Ind. 463, Sec. 217.
Stahl vs. Berger, 10 Serg. & Rawle 170, Sec. 20.
Staver vs. Locke, 22 Ore. 519, Sec. 50.
 vs. Missiner, 6 Wash. 173, Sec. 93.
Steel vs. Auditor General, 111 Mich. 381, Sec. 13.
 vs. Dixon, 17 Ch. Div. 325, Sec. 274.
 vs. Johnson, 96 Mo. App. 147, Sec. 90.
Steele vs. Crider, 61 Fed. Rep. 484, Sec. 182.
 vs. Graves, 68 Ala. 21, Sec. 100.
 vs. Holt, 75 N. C. 188, Sec. 138.
 vs. Mealing, 24 Ala. 285, Sec. 274.
Steffes vs. Lemke, 40 Minn. 27, Sec. 131.
Stein vs. Deutsch, 178 Ill. App. 615, Sec. 40.
 vs. Passmore, 25 Minn. 256, Sec. 8.
Steinhardt vs. Leman, 41 La. Ann. 835, Sec. 203.
Steinhauer vs. Colmar, 11 Colo. App. 494, Sec. 184.
Stephens vs. Elver, 101 Wis. 392, Sec. 76-a.
 vs. Miller, 3 Ky. L. Rep. 523, Sec. 182.
 vs. Shafer, 48 Wis. 54, Sec. 176.
Stephenson vs. Sinclair, 14 Tex. Civ. App. 133, Sec. 164.
Stevens vs. Carroll, 131 Iowa 170, Sec. 177.
 vs. Hay, 61 Ill. 399, Sec. 279.
 vs. Partridge, 88 Ill. App. 665, Sec. 143.

(References are to sections.)

- Stevens** vs. Tucker, 87 Ind. 109, Sec. 263, 273.
 vs. Tuite, 104 Mass. 328, Sec. 214.
Stevenson vs. Hoy, 43 Pa. St. 191, Sec. 22.
Stearns vs. Bates, 46 Conn. 306, Sec. 51, 255.
 vs. Irwin, 62 Ind. 558, Sec. 280.
Stern vs. People, 102 Ill. 540, Sec. 108, 162.
Sterns vs. Marks, 35 Barb. 565, Sec. 104.
Steadman vs. Guthrie, 4 Met. (Ky.) 147, Sec. 57.
Stetson vs. Bank, 2 O. S. 167, Sec. 174.
 vs. Moulton, 140 Mass. 597, Sec. 248.
Stetson & Post Mill Co. vs. McDonald, 5 Wash. 496, Sec. 131.
Stebbins vs. Niles, 21 Miss. 307, Sec. 181.
Sternberg vs. State, 42 Ark. 127, Sec. 232.
Stenhouse vs. Davis, 82 N. C. 432, Sec. 248.
Sterling vs. Marine Bank, 120 Md. 396, Sec. 225.
Steward vs. Welch, 84 Me. 308, Sec. 255.
Stewart vs. Behm, 2 Watts 356, Sec. 104.
 vs. Chicago Ry. Co., 141 Ind. 55, Sec. 112.
 vs. Eddowes, L. R., C. P. 211, Sec. 28.
 vs. Goulden, 52 Mich. 143, Sec. 273.
 vs. Knight & Jillson Co., 166 Ind. 498, Sec. 50, 61, 66, 67.
 vs. Parker, 55 Ga. 656, Sec. 94.
 vs. Ranney, 26 How. Pr. 279, Sec. 76.
 vs. Sharp Co. Bank, 71 Ark. 585, Sec. 61, 66, 67.
Stirling vs. Burdett, 2 Ch. 418, Sec. 269.
 vs. Forrester, 3 Bligh, 590, Sec. 279.
Stillman vs. Northup, 109 N. Y. 473, Sec. 51.
Stinson vs. Brennan, 1 Cheves Law (S. C.) 15, Sec. 286.
Stillings vs. Porter, 22 Kan. 17, Sec. 183.
Stone vs. City of Augusta, 46 Me. 127, Sec. 169.
 vs. Dennison, 13 Pick. 1, Sec. 25.
 vs. Goldberg, 6 Ala. App. 249, Sec. 15, 108.
 vs. Graves, 8 Mo. 148, Sec. 169.
 vs. Rockefeller, 29 O. S. 625, Sec. 63.
 vs. Walker, 13 Gray 613, Sec. 37.
 vs. White, 8 Gray 589, Sec. 75.
Stoner vs. Millikin, 85 Ill. 218, Sec. 108.
Stoops vs. Wittler, 1 Mo. App. 420, Sec. 103.
Stockton vs. Stockton, 40 Ind. 225, Sec. 114.
Storm vs. United States, 94 U. S. 76, Sec. 122.
Stout vs. Ennis, 28 Kan. 706, Sec. 147.
Stout. In re, 109 Fed. Rep. 794, Sec. 280.
Stockmeyer vs. Oertling, 35 La. Ann. 467, Sec. 275.
Stokes vs. Little, 65 Ill. App. 255, Sec. 248.
 vs. People, 63 Ill. 489, Sec. 229.
Stockwell vs. Robinson, 9 Houst. (Del.) 313, Sec. 165.
Stovall vs. Banks, 10 Wall. 583, Sec. 221.
Stone vs. Billings, 167 Ill. 170, Sec. 11.
Stovall vs. Banks, 10 Wall. 583, Sec. 221.
 vs. Commonwealth, 84 Va. 246, Sec. 22.

(References are to sections.)

- Stoll vs. Padley, 100 Mich. 404, Sec. 189.
 Storz vs. Finklestein, 48 Neb. 27, Sec. 203.
 Stracy vs. Bank of England, 6 Bing. 754, Sec. 93.
 Strain vs. Babb, 30 S. C. 342, Sec. 159.
 Street vs. Chicago Co., 157 Ill. 605, Sec. 281.
 Stronse vs. Elting, 110 Ala. 132, Sec. 46.
 Strange vs. Lee, 3 East. 484, Sec. 52.
 Strong vs. Foster, 17 C. B. 201, Sec. 101.
 vs. Hasterlik, 146 Ill. App. 346, Sec. 208.
 vs. Riker, 16 Vt. 555, Sec. 10.
 Stroop vs. McKenzie, 38 Tex. 132, Sec. 112.
 Stroud vs. Thomas, 139 Cal. 274, Sec. 16, 82.
 Stringfield vs. Hirsch, 94 Tenn. 425, Sec. 197.
 Strunk vs. Ochletree, 11 Iowa 158, Sec. 164.
 Stuart vs. Carter, 79 W. Va. 92, Sec. 131.
 Stubbins vs. Mitchell, 82 Ky. 535, Sec. 269, 282.
 Stull vs. Bedeo, 78 Neb. 114, Sec. 100.
 Stults vs. Zahn, 117 Ind. 297, Sec. 188.
 Sturges vs. Circleville Bank, 11 O. S. 153, Sec. 58.
 Stuart vs. Lancaster, 84 Va. 772, Sec. 85.
 vs. Livesay, 4 W. Va. 45, Sec. 123.
 St. Albans Bank vs. Dillon, 30 Vt. 122, Sec. 104.
 St. Francis Mill vs. Sugg, 83 Mo. 476, Sec. 259.
 St. John's College vs. Aetna Indemnity Co., 201 N. Y. 335, Sec. 76-b, 235.
 St. Louis vs. Foster, 24 Mo. 141, Sec. 174.
 vs. Henning, 235 Mo. 44, Sec. 229.
 vs. Von Puhl, 133 Mo. 561, Sec. 131.
 St. Louis Brewing Assn. vs. Hayes, 71 Fed. Rep. 110, Sec. 73.
 St. Louis L. & D. Ry. Co. vs. Wilder, 17 Kan. 239, Sec. 181.
 St. Louis Smelting Co. vs. Wyman, 22 Fed. Rep. 184, Sec. 189.
 St. Paul & Duluth R. Co. vs. Blackmar, 44 Min. 514, Sec. 49.
 St. Paul vs. Leck, 57 Minn. 87, Sec. 117.
 Sublett vs. McKinney, 19 Tex. 438, Sec. 247.
 Succession of Simonds, 26 La. Ann. 319, Sec. 186.
 Sullivan vs. Hugely, 48 Ga. 486, Sec. 82.
 vs. State, 59 Ark. 47, Sec. 99.
 vs. Williams, 43 S. C. 489, Sec. 201.
 Sully vs. Childress, 106 Tenn. 109, Sec. 82.
 Suman vs. Inman, 6 Mo. App. 384, Sec. 44.
 Summerhill vs. Tapp, 52 Ala. 227, Sec. 99.
 vs. Trapp, 48 Ala. 363, Sec. 100.
 Sumpter vs. Wilson, 1 Ind. 144, Sec. 199.
 Supervisors vs. Bristol, 99 N. Y. 316, Sec. 174.
 vs. Kennicott, 103 U. S. 554, Sec. 188.
 Supervisors Lauderdale vs. Alford, 65 Miss. 63, Sec. 156.
 Suppiger vs. Gruaz, 137 Ill. 216, Sec. 215.
 Supreme Council vs. Boyle, 15 Ind. App. 342, Sec. 190.
 Supreme Council Catholic Knights vs. Fidelity & Casualty Co., 63 Fed. Rep. 48, Sec. 141, 147, 238.

(References are to sections.)

- Sutherland vs. Carr, 85 N. Y. 105, Sec. 146, 163.
 vs. Phelps, 22 Ill. 91, Sec. 186.
 Sutton & Co. vs. Grey, 1 Q. B. 285, Sec. 44.
 Swan vs. Gray, 44 Miss. 393, Sec. 148.
 vs. Hill, 155 U. S. 394, Sec. 181.
 vs. Smith, 57 Miss. 548, Sec. 249, 251.
 vs. Timmons, 81 Ind. 243, Sec. 195.
 Swartwont vs. Payne, 19 Johns. 295, Sec. 97.
 Swain vs. Barber, 29 Vt. 292, Sec. 277.
 Swasey vs. Doyle, 88 Mo. App. 536, Sec. 76-a.
 Swarts vs. Fourth Nat. Bank, 117 Fed. 1, Sec. 97.
 Sweet vs. Jeffries, 48 Mo. 279, Sec. 248.
 Swift vs. Beers, 3 Denio 70, Sec. 103.
 vs. Plessner, 39 Mich. 178, Sec. 208.
 Swisher vs. Deering, 204 Ill. 203, Sec. 49, 67, 68.
 vs. McWhinney, 64 O. S. 343, Sec. 227.
 Switzer vs. Baker, 95 Cal. 539, Sec. 58.
 vs. Skiles, 8 Ill. 529, Sec. 46.
 Switzer, In re, 201 Mo. 66, Sec. 222.
 Swofford Bros. vs. Livingston, 65 Pac. Rep. 413, Sec. 186.
 Sylvester vs. Downer, 20 Vt. 355, Sec. 8, 68.

T

- Tabor vs. Clark, 15 Col. 434, Sec. 197.
 vs. Miles, 5 Col. App. 127, Sec. 10.
 Talbot vs. Gay, 18 Pick. 534, Sec. 67.
 Talcott vs. Henderson, 31 O. S. 162, Sec. 110.
 Tanquary vs. Bashor, 42 Col. 231, Sec. 182.
 vs. People, 25 Col. App. 531, Sec. 231.
 Tapley vs. Goodsell, 122 Mass. 176, Sec. 202.
 Tarpey vs. Sharp, 12 Utah 383, Sec. 188.
 Tarr vs. Ravenscroft, 12 Gratt. 642, Sec. 271, 273.
 Tate vs. Booe, 9 Ind. 13, Sec. 135.
 vs. Winfree, 37 S. E. (W. Va.) 956, Sec. 262.
 Tatlock vs. Smith, 6 Bing. 339, Sec. 93.
 Tatum vs. Tatum, 1 Ired. Eq. (N. C.) 113, Sec. 248.
 Taussig vs. Reid, 145 Ill. 488, Sec. 18, 68.
 Taylor vs. Alexander, 6 O. 144, Sec. 173.
 vs. Allen, 40 Minn. 433, Sec. 46.
 vs. Farmers Bank of Ky., 87 Ky. 398, Sec. 255.
 vs. Glaser, 2 Serg. & Rawle 502, Sec. 134.
 vs. Higgins, 3 East. 169, Sec. 282.
 vs. Jeter, 23 Mo. 244, Sec. 98.
 vs. McClung's Ex., 2 Houst. (Del.) 24, Sec. 52, 66.
 vs. Mygatt, 26 Conn. 184, Sec. 135; 218.

(References are to sections.)

- Taylor vs. Reynolds, 53 Cal. 686, Sec. 269.
 vs. Ross, 3 Yerg. 330, Sec. 27.
 vs. Smith, 116 N. C. 531, Sec. 49.
 vs. Sullivan, 45 Minn. 309, Sec. 153.
 vs. Taintor, 16 Wall. 371, Sec. 232.
 vs. Taylor, 12 Lea (Tenn.) 714, Sec. 74.
 vs. Wetmore, 10 O. 491, Sec. 52.
 vs. Wightman, 51 Iowa 411, Sec. 16.
 Taylor County vs. King, et al., 73 Iowa 153, Sec. 15, 23-a, 109.
 Teaff vs. Ross, 1 O. S. 469, Sec. 99, 257.
 Teasley vs. Ray, 9 Ga. App. 649, Sec. 23-a.
 Teberg vs. Swenson, 32 Kan. 224, Sec. 279.
 Tebo vs. Betancourt, 73 Miss. 868, Sec. 208.
 Teel vs. Tice, 14 N. J. L. 444, Sec. 186, 187.
 Teeter vs. Pierce, 11 B. Mon. 399, Sec. 274.
 Teeters vs. Lamborn, 43 O. S. 144, Sec. 42.
 Temple vs. Baker, 125 Pa. 634, Sec. 10.
 Templeton vs. Shakley, 107 Pa. 370, Sec. 98.
 Ten Eyck vs. Holmes, 3 Sandf. Ch. 428, Sec. 255.
 vs. Sayer, 76 Hun 37, Sec. 197.
 Terrell vs. Ingersoll, 78 Tenn. 77, Sec. 196.
 Terry vs. Groves, 258 Mo. 450, Sec. 23.
 Territory vs. Conner, 17 Okl. 135, Sec. 229, 231.
 vs. Minter, 88 Pac. 1130, Sec. 231.
 Tessier vs. Crowley, 17 Neb. 207, Sec. 12.
 Tevis vs. Randall, 6 Cal. 632, Sec. 146.
 Texas Trunk Ry. vs. Jackson, 85 Tex. 605, Sec. 188.
 Thalheimer vs. Crow, 13 Col. 397, Sec. 117, 184.
 Thayer vs. Clark, 48 Barb. 243, Sec. 217.
 vs. Daniels, 110 Mass. 345, Sec. 280, 287.
 vs. King, 31 Hun 437, Sec. 83.
 vs. Luce, 22 O. S. 62, Sec. 29.
 The Hattie M. Spraker, 29 Fed. Rep. 457, Sec. 251.
 Third National Bank vs. Laidlaw, 86 O. S. 91, Sec. 49, 50.
 vs. Owen, 101 Mo. 558, Sec. 15, 106, 127, 132.
 Thomas vs. Bank, 40 Neb. 501, Sec. 11.
 vs. Bleakie, 136 Mass. 568, Sec. 127.
 vs. Burrus, 23 Miss. 550, Sec. 19.
 vs. Carter, 63 Vt. 609, Sec. 282.
 vs. Churchill, 48 Neb. 266, Sec. 46.
 vs. Cleveland, 33 Mo. 126, Sec. 98.
 vs. Cook, 8 Barn. & Cres. 728, Sec. 32, 265, 267.
 vs. Hinkley, 19 Neb. 324, Sec. 21.
 vs. Kinkead, 55 Ark. 503, Sec. 170.
 vs. Markmann, 43 Neb. 823, Sec. 164, 177.
 vs. McDaneld, 77 Iowa 299, Sec. 197.

(References are to sections.)

- Thomas** vs. State, 127 S. W. 1030, Sec. 230.
 vs. Steele, 22 Wis. 207, Sec. 145.
 vs. Stetson, 59 Maine 229, Sec. 81.
 vs. Williams, 10 Barn. & Cr. 664, Sec. 16.
 vs. Wright, 98 N. C. 272, Sec. 58.
- Thomason** vs. Clark, 31 Ill. App. 404, Sec. 114.
 vs. Wade, 72 Ga. 160, Sec. 249.
- Thompson** vs. Board, 30 Ill. 99, Sec. 167.
 vs. Browne, 39 N. J. L. 2, Sec. 115.
 vs. Davis, 297 Ill. 11, Sec. 244.
 vs. Dickerson, 22 Iowa 360, Sec. 158.
 vs. Hall, 16 Ala. 204, Sec. 27.
 vs. Jackson, 93 Iowa 376, Sec. 168.
 vs. Lack, 3 C. B. R. 540, Sec. 114.
 vs. Mann, 65 W. Va. 648, Sec. 221.
 vs. Massie, 41 O. S. 307, Sec. 20.
 vs. Prouty, 27 Vt. 14, Sec. 128.
 vs. Robinson, 34 Ark. 44, Sec. 84, 115.
 vs. State, 37 Miss. 518, Sec. 153.
 vs. Taylor, 72 N. Y. 32, Sec. 115, 283.
 vs. Treller, 82 Ark. 247, Sec. 115.
 vs. Watson, 10 Yerg. (Tenn.) 362, Sec. 115, 116.
- Thorn** vs. Pinkham, 84 Me. 101, Sec. 118.
- Thorne** vs. Travellers Ins. Co., 80 Pa. St. 15, Sec. 19, 138.
- Thorington** vs. Smith, 8 Wall. 1, Sec. 49.
- Thornton** vs. Thornton, 63 N. C. 211, Sec. 99.
- Thornburgh** vs. Madrem, 33 Iowa 380, Sec. 113.
- Thrall** vs. Mead, 40 Vt. 540, Sec. 178.
- Throop** vs. Langdon, 40 Mich. 673, Sec. 145.
- Thurber** vs. Corbin, 51 Barb. 215, Sec. 23.
- Thurston** vs. James, 6 R. I. 103, Sec. 86.
- Tidball** vs. Halley, 48 Cal. 610, Sec. 23-a, 74, 109.
- Tidioute Sav. Bank** vs. Libbey, 101 Wis. 193, Sec. 51.
- Tieman** vs. Haw, 49 Iowa 312, Sec. 164.
- Tighe** vs. Morrison, 116 N. Y. 263, Sec. 31.
- Tillinghast** vs. Merrill, 151 N. Y. 135, Sec. 166.
- Tillotson** vs. Rose, 11 Met. 299, Sec. 280.
- Tilt-Kenney Shoe Co.** vs. Haggart, 43 Tex. Civ. App. 335, Sec. 61, 66, 67.
- Timm** vs. Grand Rapids Brewing Co., 160 Mich. 371, Sec. 11.
- Tinsley** vs. Kemery, 111 Mo. App. 87, Sec. 76-b.
 vs. Kirby, 17 S. C. 1, Sec. 19.
- Tischler** vs. Hofheimer, 83 Va. 35, Sec. 48, 71.
- Titcomb** vs. McAllister, 81 Me. 399, Sec. 274.
- Title Guaranty & Surety Co.** vs. Schmidt, 213 Fed. 199, Sec. 23-a, 127, 129
 vs. Slinker, 35 Okl. 128, Sec. 226.
- Title Guaranty & Trust Co.** vs. Crane Co., 219 U. S. 24, Sec. 131.
 vs. Haven, 89 N. E. 1082, Sec. 248.
- Titus** vs. Durkee, 12 Up. Can. (C. P.) 367, Sec. 73.

(References are to sections.)

- Tobias vs. Rogers, 13 N. Y. 59, Sec. 277.
 Tobin Canning Co. vs. Fraser, 81 Tex. 407, Sec. 82.
 Todd vs. Greenwood School Dist., 40 Mich. 294, Sec. 81.
 vs. Tobey, 20 Me. 219, Sec. 43.
 Toffler vs. Kesinger, 80 Kas. 549, Sec. 220.
 Toles vs. Adey, 84 N. Y. 222, Sec. 21, 111.
 Tolerton & Stetson Co. vs. Roberts, 115 Iowa 474, Sec. 118.
 Tolman Co. vs. Hunter, 113 Mo. App. 671, Sec. 79.
 vs. Means, 52 Mo. App. 385, Sec. 66.
 Tom vs. Goodrich, 2 Johns. 213, Sec. 279.
 Tompkins vs. Catawba Mills, 82 Fed. Rep. 780, Sec. 255.
 Toomer vs. Dickerson, 37 Ga. 428, Sec. 257.
 vs. Rutland, 57 Ala. 379, Sec. 74.
 Topeka vs. Federal Union Surety Co., 213 Fed. 958, Sec. 233.
 Topping vs. Windley, 99 N. C. 4, Sec. 159.
 Toronto Bank vs. Hunter, 4 Bosw. (N. Y.) 646, Sec. 251.
 Torp vs. Gulseth, 37 Minn. 135, Sec. 244, 248.
 Tousey vs. State, 8 Tex. 173, Sec. 231.
 Toussaint vs. Martinnant, 2 T. R. 100, Sec. 279.
 Towers vs. Moore, 2 Vern. 98, Sec. 119.
 Towle vs. Nat. Guardian Assurance Soc., 3 Giff. 42, Sec. 110.
 Town of Barnet vs. Abbott, 53 Vt. 120, Sec. 134.
 Town of Whitestown vs. Title Guar. & Sur. Co., 131 N. Y. S. 390, Sec. 18.
 Towns vs. Riddle, 2 Ala. 694, Sec. 114.
 Townsend vs. Hargraves, 118 Mass. 325, Sec. 28, 47.
 vs. Hubbard, 4 Hill (N. Y.) 351, Sec. 142.
 vs. Whitney, 75 N. Y. 425, Sec. 247, 249.
 Townsend Nat. Bank vs. Jones, 151 Mass. 454, Sec. 206.
 Trader vs. Sale, 18 O. C. C. 814, Sec. 186.
 Traders' Ins. Co. vs. Herber, 67 Minn. 106, Sec. 106.
 Traders' Nat. Bank vs. Parker, 130 N. Y. 415, Sec. 57.
 Travis vs. Travis, 48 Hun 343, Sec. 13, 181.
 Travers vs. Dorr, 60 Minn. 173, Sec. 90.
 Train vs. Emerson, 80 S. E. 554, Sec. 262.
 Travellers Ins. Co. vs. Weber, 4 N. D. 135, Sec. 182.
 Trammell vs. Swan, 25 Tex. 473, Sec. 15, 105.
 Trapnall vs. McAfee, 60 Ky. 34, Sec. 208.
 Trainor vs. Board of Auditors, 89 Mich. 162, Sec. 145.
 Tracy vs. Goodwin, 5 Allen 409, Sec. 177.
 Trasch, In re, 31 Pac. 755, Sec. 252.
 Treasurer of City of Boston vs. Schapera, 217 Mass. 71, Sec. 177.
 Treasurer of Vermont vs. Merrill, 14 Vt. 64, Sec. 229.
 Trego vs. Estate of Cunningham, 267 Ill. 367, Sec. 272.
 Treweek vs. Howard, 105 Cal. 434, Sec. 218.
 Trimble vs. Keer-Rountree Mer. Co., 56 Mo. App. 683, Sec. 214.
 Trinity Parish vs. Aetna Indemnity Co., 37 Wash. 515, Sec. 131.
 Trogden vs. Cleveland Stone Co., 53 Ill. App. 206, Sec. 187.
 Troup vs. Smith's Executors, 20 Johns. 33, Sec. 141.

(References are to sections.)

- Troy Fertilizer Co. vs. Logan, 96 Ala. 619, Sec. 28.
 Truesdell vs. Combs, 33 O. S. 186, Sec. 168.
 Trust Co. vs. National Bank, 101 U. S. 68, Sec. 51.
 Trustees vs. Arnold, 58 Ill. App. 103, Sec. 156.
 vs. Sheik, 119 Ill. 579, Sec. 148, 149.
 vs. Smith, 88 Ill. 181, Sec. 156.
 vs. Southard, 31 Ill. App. 359, Sec. 114.
 Trustees of Dartmouth College vs. Woodward, 4 Wheat. 518, 694, Sec. 145.
 Trustees of Seventh Baptist Church vs. Andrew & Thomas, 115 Md. 535, Sec. 17, 76-a.
 Trustees of Presbyterian Board of Gilliford, 130 Ind. 524, Sec. 96.
 Tuck vs. Calvert, 33 Md. 209, Sec. 248.
 Tucker vs. Mueller, 287 Ill. 551, Sec. 8, 10.
 vs. State, etc., 11 Md. 322, Sec. 19, 182.
 vs. Stewart, 147 Iowa 294, Sec. 222.
 vs. White, 5 Allen 322, Sec. 206.
 Tuckeman vs. French, 7 Me. 115, Sec. 66.
 Tudhope vs. Potts, 91 Mich. 490, Sec. 220.
 Tulburt vs. Hollar, 102 N. C. 406, Sec. 223.
 Tullock vs. Mulvane, 184 U. S. 497, Sec. 197.
 Tuohy vs. Woods, 122 Cal. 665, Sec. 81, 90.
 Turk vs. Marshall Silver Mining Co., 8 Col. 113, Sec. 135.
 Turner vs. Collier, 4 Heisk (Tenn.) 89, Sec. 164.
 vs. Davies, 2 Esp. 478, Sec. 267.
 vs. Fidelity & Deposit Co. of Maryland (Cal.), 200 Pac. 951, Sec. 205.
 vs. Hampton, 30 Ky. Law Rep. 179, Sec. 101.
 vs. Killian, 12 Neb. 580, Sec. 164.
 vs. National Cotton Oil Co., 50 Tex. Civ. App. 468, Sec. 17.
 vs. Sisson, 137 Mass. 191, Sec. 164.
 vs. State, 14 Tex. App. 168, Sec. 231.
 vs. Stewart, 51 W. Va. 493, Sec. 89.
 vs. Thorn, 89 Va. 745, Sec. 275.
 Turnbull vs. Brock, 31 O. S. 649, Sec. 82.
 Tuttle vs. Bartholomew, 12 Met. 452, Sec. 51.
 vs. Northrup, 44 O. S. 178, Sec. 224.
 Tuxbury vs. Miller, 19 Johns. 311, Sec. 138.
 Tweddle vs. Atkinson, 1 Best. & S. M. 393, Sec. 142.
 Twidwell vs. Smith, 158 Ill. App. 142, Sec. 203.
 Twitty vs. Houser, 7 S. C. 153, Sec. 218.
 Twombly vs. Cassidy, 82 N. Y. 159, Sec. 244.
 Tyler vs. Hamilton, 108 Ky. 120, Sec. 197.
 vs. Trustees, 14 Ore. 485, Sec. 117.
 vs. Waddingham, 58 Conn. 375, Sec. 61.
 Tynburg vs. Cohen, 67 Tex. 220, Sec. 203, 207.
 Tyng vs. American Surety Co., 48 App. Div. 240, Sec. 208.
 Tyree vs. Wilson, 9 Gratt. (Va.) 59, Sec. 154.
 Tyson vs. Sanderson, 45 Ala. 364, Sec. 137, 188.

(References are to sections.)

U

- Ueberroth vs. Riegel, 71 Pa. 280, Sec. 36.
 Uhler vs. Applegate, 26 Pa. 140, Sec. 82.
 Ulen vs. Kittredge, 7 Mass. 233, Sec. 22.
 Ullmann Realty Co. vs. Hollander, 123 N. Y. S. 772, Sec. 79.
 Ullery vs. Kokott, 61 Pac. Rep. (Col. App.) 189, Sec. 181.
 Ulrich vs. Farrington Co., 69 Wis. 213, Sec. 181.
 Ulster Co. Savings Bank vs. Ostrander, 163 N. Y. 430, Sec. 129.
 vs. Young, 161 N. Y. 23, Sec. 238.
 Umsted vs. Buskirk, 17 O. S. 114, Sec. 266.
 Underhill vs. Spencer, 25 Kan. 71, Sec. 197.
 Underwood vs. Campbell, 14 N. H. 393, Sec. 27.
 vs. Robinson, 106 Mass. 296, Sec. 172.
 Union Bank vs. Coster, 3 N. Y. 203, Sec. 51, 66.
 vs. Forrest, 3 Cranch C. C. 218, Sec. 130.
 vs. Govan, 18 Miss. 333, Sec. 99.
 Union Bank of Maryland, vs. Ridgely, 1 Har. & G. (Md.) 324, Sec. 123, 129.
 Union Central Life Ins. Co. vs. U. S. Fidelity & Guar. Co., 99 Md. 423,
 Sec. 233, 239.
 Union Dime Sav. Institute vs. Neppert, 21 N. Y. S. R. 723, Sec. 132.
 Union Mutual Life Ins. Co. vs. Handford, 27 Fed. Rep. 588, Sec. 23, 90.
 Union Nat. Bank vs. Cooley, 27 La. Ann. 202, Sec. 98.
 vs. First Nat. Bank, 45 O. S. 236, Sec. 58.
 vs. Rich, 106 Mich. 319, Sec. 255.
 Union Pacific Tea Co. vs. Dick, 87 Conn. 711, Sec. 215.
 Union Township vs. Smith, 39 Iowa 9, Sec. 164.
 Union Trust Co. vs. Shoemaker, 258 Ill. 564, Sec. 119, 215.
 vs. McGinty, 212 Mass. 205, Sec. 8.
 United Amer. Fire Ins. Co. vs. Amer. Bonding Co., 146 Wis. 573, Sec. 233.
 United Walnut Co. vs. Courtney, 96 Ark. 46, Sec. 39.
 United States vs. Adams, 24 Fed. Rep. 348, Sec. 163.
 vs. Allsbury, 4 Wall. 186, Sec. 177.
 vs. Ambrose, 2 Fed. Rep. 552, Sec. 21.
 vs. Backland, 33 Fed. Rep. 156, Sec. 91.
 vs. Boyd, 5 How. 29, Sec. 174.
 vs. Bradley, 10 Peters 343, Sec. 146.
 vs. Broadhead, 127 U. S. 212, Sec. 70, 137, 232.
 vs. Burgdorf, 13 App. D. C. 506, Sec. 131.
 vs. Curtis, 100 U. S. 119, Sec. 70, 137.
 vs. Dashiell, 4 Wall. 182, Sec. 164.
 vs. Du Faur, 187 Fed. 812, Sec. 23.
 vs. Edwards, 1 McLean 467, Sec. 145.
 vs. Evans, 2 Fed. Rep. 147, Sec. 231.
 vs. Freel, 186 U. S. 309, Sec. 76-a.
 vs. Hartwell, 6 Wall. 385, Sec. 145, 147.

(References are to sections.)

- United States** vs. Hazzard, 53 App. Div. 410, Sec. 76-a.
 vs. Hudson, 65 Fed. 68, Sec. 228.
 vs. Jones, 36 Fed. 759, Sec. 167.
 vs. Keiver, 56 Fed. 422, Sec. 229.
 vs. Linn, 15 Peters 290, Sec. 146.
 vs. Marrin, 170 Fed. 476, Sec. 232.
 vs. Martin, 17 Fed. 150, Sec. 147.
 vs. Mason, 2 Bond 183, Sec. 146.
 vs. Maurice, 2 Brock 96, Sec. 145.
 vs. McCartney, 1 Fed. 104, Sec. 152.
 vs. McClane, 74 Fed. 153, Sec. 159.
 vs. Morgan, 28 Fed. 48, Sec. 163.
 vs. Morgan, 11 How. 154, Sec. 167.
 vs. Morris Heirs, 153 Fed. 240, Sec. 162.
 vs. Mosby, 133 U. S. 286, Sec. 160.
 vs. Mynderse, 11 Blatch. 1, Sec. 146.
 vs. National Surety Co., 92 Fed. 549, Sec. 76-a.
 vs. National Surety Co., 254 U. S. 73, Sec. 248.
 vs. O'Neill, 19 Fed. 567, Sec. 20.
 vs. Poulson, 30 Fed. 231, Sec. 137.
 vs. Powell, 14 Wall. 493, Sec. 152.
 vs. Prescott, 3 How. 578, Sec. 167.
 vs. Price, 9 How. 84, Sec. 119.
 vs. Quinn, 122 Fed. 65, Sec. 70.
 vs. Rogers, 28 Fed. 607, Sec. 146.
 vs. Ryder, 110 U. S. 729, Sec. 279.
 vs. Simmons, 47 Fed. 575, Sec. 279.
 vs. Thomas, 15 Wall. 337, Sec. 167.
 vs. Walker, 109 U. S. 258, Sec. 223.
 vs. Wallace, 46 Fed. 569, Sec. 228.
 vs. Walsh, 115 Fed. 697, Sec. 76-a.
- United States Bank** vs. Dandridge, 12 Wheat. 69, Sec. 173.
- United States Fidelity Co.** vs. Riefler, 239 U. S. 17, Sec. 123.
- U. S. Fidelity & Guaranty Co.** vs. Amer. Blower Co., 41 Ind. App. 620, Sec. 76-a.
 vs. Bartlett, 231 U. S. 237, Sec. 131.
 vs. Charles, 131 Ala. 658, Sec. 16.
 vs. Citizens' State Bank, 36 N. D. 16, Sec. 178.
 vs. First Nat. Bank, 233 Ill. 475, Sec. 233, 239.
 vs. French Ins. Co., 212 Fed. 620, Sec. 233.
 vs. Golden Pressed Brick Co., 191 U. S. 416, Sec. 233.
 vs. Haggart, 163 Fed. 801, Sec. 122.
 vs. McGinnis' Admr., 147 Ky. 781, Sec. 262.
 vs. Omaha Bldg. & Cons. Co., 116 Fed. 145, Sec. 76-a.
 vs. Overstreet, 84 S. W. 764, Sec. 233.
 vs. People, 159 Ill. App. 35, Sec. 222.

(References are to sections.)

- U. S. Fidelity & Guaranty Co. vs. Peoples Bank, 157 S. W. 414, Sec. 248.
 vs. Poetker, 180 Ind. 255, Sec. 146, 233.
 vs. Russell, 141 Ky. 601, Sec. 218, 221.
 vs. State, 40 Ind. App. 136, Sec. 224.
 vs. United States, 194 Fed. 611, Sec. 76-a.
 vs. United States, 178 Fed. 692, Sec. 81.
- United States Glass Co. vs. Mathews, 89 Fed. 828, Sec. 73.
- United States Mortgage Co. vs. Gross, 93 Ill. 483, Sec. 255.
- United States Printing & Lithographing Co. vs. Powers (N. Y.), 135 N. E. 225, Sec. 128.
- United States vs. National Surety Co., 34 C. C. A. 526, Sec. 131.
- United States Surety Co. vs. American Fruit Co., 40 App. D. C. 239, Sec. 187.
- Updegraff vs. Edwards, 45 Iowa 513, Sec. 255.
- Uptmoor vs. Young, 57 Ark. 528, Sec. 280.

V

- Vail vs. Foster, 4 N. Y. 312, Sec. 272.
- Valentine vs. Donohoe-Kelly Banking Co., 133 Cal. 191, Sec. 71, 119.
 vs. Wheeler, 116 Mass. 478, Sec. 123.
- Vance vs. Lancaster, 3 Haywood (Tenn.) 130, Sec. 283.
- Vanderford vs. Farmers & Mechanics Bank, 105 Md. 164, Sec. 91-a.
- Vandiver vs. Pollak, 107 Ala. 547, Sec. 274.
- Vanover vs. Thompson, 49 N. C. 485, Sec. 138.
- Vandyke vs. Weil, 18 Wis. 277, Sec. 185.
- Van Deusen vs. Hayward, 17 Wend. 67, Sec. 181.
- Van Doren vs. Tjader, 1 Nev. 380, Sec. 8, 10.
- Van Patton & Marks vs. Beals & Hammer, 46 Iowa 62, Sec. 11.
- Van Pelt vs. Littler, 14 Cal. 194, Sec. 164.
- Van Petten vs. Richardson, 68 Mo. 379, Sec. 283.
- Van Slyke vs. Bush, 123 N. Y. 47, Sec. 227.
 vs. Trempealeau Ins. Co., 39 Wis. 390, Sec. 147.
- Van Valkenbergh vs. Smith, 60 Me. 97, Sec. 122.
- Van Wart vs. Carpenter, 21 Up. Can. (Q. B.) 320, Sec. 51.
- Van Winkle vs. Johnson, 11 Ore. 469, Sec. 271, 283.
- Vass vs. Riddick, 89 N. C. 6, Sec. 108, 109.
- Vaughan vs. Halliday, 9 L. R. Ch. App. 561, Sec. 256.
- Vaughn vs. Smith, 65 Iowa 579, Sec. 41.
- Veach vs. Rice, 131 U. S. 293, Sec. 108.
- Vermeule vs. York Cliffs Improvement Co., 105 Me. 350, Sec. 280.
- Vert vs. Voss, 74 Ind. 566, Sec. 245.
- Vias vs. Comm., 7 Ky. L. Rep. 742, Sec. 231.
- Vicksburg Waterworks vs. Mayor of Vicksburg, 99 Miss. 132, Sec. 197.
- Victoria Lumber Co. vs. Wells, 139 La. 500, Sec. 233.
- Vidi vs. United Surety Co., 140 N. Y. S. 612, Sec. 71.
- Vielie vs. Osgood, 8 Barb. 130, Sec. 30, 122.
- Village of Argyle vs. Plunkett, 226 N. Y. 306, Sec. 131.
- Village of Chester vs. Leonard, 68 Conn. 495, Sec. 76-a.
- Villars vs. Palmer, 67 Ill. 204, Sec. 95.

(References are to sections.)

- Vinal vs. Richardson, 13 Allen 532, Sec. 67.
 Vincent vs. Logsdon, 17 Ore. 284, Sec. 251.
 Vindquest vs. Perky, 16 Neb. 284, Sec. 28.
 Vinton vs. Mansfield, 48 Conn. 474, Sec. 215.
 Vinyard vs. Barnes, 124 Ill. 346, Sec. 17.
 Violet vs. Patton, 5 Cranch (U. S.) 142, Sec. 27.
 Viriden vs. Ellsworth, 15 Ind. 144, Sec. 117.
 Vivian vs. State, 16 Tex. App. 262, Sec. 230.
 Vliet vs. Wyckoff, 42 N. J. Eq. 642, Sec. 269.
 Vogel vs. Melms, 31 Wis. 306, Sec. 23.
 Vogelsang vs. Taylor, 80 S. W. 637, Sec. 23-a.
 Voss vs. German Bank, 83 Ill. 599, Sec. 101, 257.
 Vurpillat vs. Zehner, 2 Ind. App. 397, Sec. 205.

W

- Waddell vs. Bradway, 84 Ind. 537, Sec. 212.
 vs. Moore, 24 N. C. 261, Sec. 142.
 Wade vs. Staunton, 5 How. (Miss.) 631, Sec. 86.
 Wadsworth vs. Allen, 8 Gratt. 174, Sec. 66, 96.
 vs. O'Donnell, 7 Ky. L. Rep. 837, Sec. 196.
 vs. Smith, 43 Iowa 439, Sec. 49.
 Wagenseller vs. Prettyman, 7 Ill. App. 192, Sec. 271.
 Waggener vs. Dyer, 11 Leigh (Va.) 384, Sec. 114.
 Wagner vs. Stocking, 22 O. S. 297, Sec. 117.
 Wain vs. Warlters, 5 East. 21, Sec. 25, 26, 27.
 Wainwright vs. Straw, 15 Vt. 215, Sec. 37.
 Walker vs. Forbes, 25 Ala. 139, Sec. 66, 68.
 vs. Gregory, 36 Ala. 180, Sec. 138.
 vs. Holtzelaw, 57 S. C. 459, Sec. 236.
 vs. Pritchard, 34 Ill. App. 65, Sec. 193.
 vs. Richards, 41 N. H. 368, Sec. 36.
 vs. Simpson, 7 Watts. & Serg. 83, Sec. 259.
 vs. State, 176 Ind. 40, Sec. 17.
 Walker, Admr., vs. Lathrop, 6 Iowa 516, Sec. 284.
 Walker, In re., L. R., 1 Ch. 621 (1892), Sec. 256.
 Walton vs. Develing, 61 Ill. 201, Sec. 195.
 vs. Mascal, 13 M. & W. 452, Sec. 51, 67.
 Walden Nat. Bank vs. Birch, 130 N. Y. 221, Sec. 130.
 Walker vs. O. M. & N. R. R. Co., 277 Ill. 451, Sec. 283.
 Wallace vs. Exchange Bank, 126 Ind. 265, Sec. 132.
 vs. Finberg, 46 Tex. 35, Sec. 200.
 vs. Hudson, 37 Tex. 456, Sec. 112.
 vs. Insurance Co., 41 Fed. Rep. 742, Sec. 238.
 vs. Jewell, 21 O. S. 163, Sec. 75.
 vs. York, 45 Iowa 81, Sec. 197.
 Wallis vs. Dilly, 7 Md. 237, Sec. 143.
 vs. Keeney, 88 Ill. 370, Sec. 135.
 vs. Swinburne, 1 Welsb. H. & G. 203, Sec. 269.

(References are to sections.)

- Waller vs. Pittman, 1 N. C. 324, Sec. 182.
 Wallerstein vs. American Surety Co., 15 N. Y. Supp. 954, Sec. 187.
 Waldrip vs. Black, 74 Cal. 409, Sec. 265, 282.
 Walsh Const. Co. vs. City of Cleveland, 250 Fed. 137, Sec. 117, 144.
 Walton vs. American Surety Co., 264 Pa. 272, Sec. 14.
 Walz vs. Alback, 37 Md. 404, Sec. 10.
 Walsh vs. Bailie, 10 Johns. 180, Sec. 52.
 vs. Miller, 51 O. S. 462, Sec. 114, 227.
 Walmsley vs. Booth, 27 Eng. Rep. Rept. 626, Sec. 145.
 Wanamaker vs. Otis Elevator Co., 228 N. Y. 192, Sec. 283.
 Wapello vs. Bigham, 10 Iowa 39, Sec. 156.
 Wapello State Sav. Bank vs. Colton, 110 N. W. 450, Sec. 129.
 Ward vs. Churn, 18 Gratt. 801, Sec. 74, 109.
 vs. Hackett, 30 Minn. 150, Sec. 75, 109.
 vs. National Bank of New Zealand, 8 New Zealand, L. R., 10, Sec. 245.
 vs. National Surety Co., 152 S. W. 397, Sec. 105.
 vs. Stahl, 81 N. Y. 406, Sec. 163.
 vs. Whitney, 8 N. Y. 442, Sec. 199.
 vs. Wick, 17 O. S. 159, Sec. 84.
 Ward, Appeal of, 100 Pa. 289, Sec. 249.
 Warder B. & G. Co. vs. Stewart, 36 Atl. 88, Sec. 122.
 Warren vs. Branch, 15 W. Va. 21, Sec. 15.
 vs. Dickson, 27 Ill. 115, Sec. 46.
 vs. Hayzlett, 45 Iowa 235, Sec. 244.
 vs. Louisville Tobacco Exchange, 55 S. W. 912, Sec. 114.
 Warden vs. Ryan, 37 Mo. App. 466.
 Warner vs. Beardsley, 8 Wend. 198, Sec. 116.
 vs. Benjamin, 89 Wis. 290, Sec. 110.
 vs. Cameron, 64 Mich. 185, Sec. 185.
 vs. Morrison, 3 Allen 566, Sec. 275.
 vs. Willoughby, 60 Conn. 468, Sec. 41.
 Ware vs. Allen, 128 U. S. 590, Sec. 127.
 Warfield vs. Brand, 76 Ky. 77, Sec. 218.
 Wartman vs. Yost, 22 Gratt. 595, Sec. 117.
 Wasco County vs. N. E. Equitable Ins. Co., 88 Oregon 465, Sec. 233, 244.
 Wash vs. Lackland, 8 Mo. App. 122, Sec. 197.
 Washington vs. Hosp, 49 Kan. 324, Sec. 173.
 vs. Norwood, 128 Ala. 363, Sec. 269.
 vs. Tait, 3 Hump. (Tenn.) 543, Sec. 115.
 Washington Co. Ins. Co. vs. Colton, 26 Conn. 42, Sec. 134.
 Washington Ice Co. vs. Webster, 125 U. S. 426, Sec. 19, 214.
 vs. Webster, 62 Me. 341, Sec. 29.
 Waters vs. Melson, 112 N. C. 89, Sec. 163.
 vs. People, 4 Col. App. 97, Sec. 231.
 vs. Whittemore, 22 Barb. 593, Sec. 195.
 Waterbury vs. Andrews, 67 Mich. 281, Sec. 15, 105.
 Waterman vs. Clark, 76 Ill. 428, Sec. 117.
 vs. Dockray, 78 Me. 139, Sec. 223.
 vs. Vose, 43 Me. 504, Sec. 72.
 Watertown Fire Inh. Co. vs. Simmons, 131 Mass. 85, Sec. 67, 107.
 Watertown Savings Bank vs. Mattoon, 78 Conn. 388, Sec. 106.

(References are to sections.)

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 vs. McCall, 116 Minn. 389, Sec. 66.
- Watts vs. Shuttlesworth, 5 Hurl. & Nor. 235, Sec. 77, 98.
- Watriss vs. Pierce, 32 N. H. 560, Sec. 77, 127.
- Watson vs. Hurt, 6 Gratt. 633, Sec. 8, 10.
 vs. Jacobs, 29 Vt. 169, Sec. 38.
 vs. Johnson, 13 Ky. L. Rep. 336, Sec. 190.
 vs. Poague, 42 Iowa 582, Sec. 97.
 vs. Watson, 9 Conn. 140, Sec. 172.
 vs. Wilcox, 39 Wis. 643, Sec. 259.
- Waughop vs. Bartlett, 165 Ill. 124, Sec. 95.
- Way vs. Butterworth, 108 Mass. 509, Sec. 8, 10.
 vs. Hearn, 11 C. B. (N. S.) 774, Sec. 88.
- Wayman vs. Jones, 58 Mo. App. 313, Sec. 23.
- Waymire vs. Waymire, 141 Ind. 164, Sec. 45.
- Wayne vs. Bank, 52 Pa. 343, Sec. 106.
 vs. Commercial National Bank, 52 Pa. 343, Sec. 141.
- Wayne Co. vs. Cardwell, 73 Ind. 555, Sec. 108.
- W. C. & A. Railroad Co. vs. Ling, 18 S. C. 116, Sec. 15.
- Weare vs. Sawyer, 44 N. H. 198, Sec. 11-a, 104.
- Weatherby vs. Shackelford, 37 Miss. 559, Sec. 196.
- Weaver vs. Prebster, 37 Ind. App. 582, Sec. 82.
 vs. Shryock, 6 Serg. & R. 262, Sec. 69, 119.
- Webb vs. Anspach, 3 O. S. 522, Sec. 163.
 vs. Dickenson, 11 Wend. 62, Sec. 96.
 vs. Gross, 79 Me. 224, Sec. 217.
 vs. Hawkins Lumber Co., 101 Ala. 630, Sec. 36.
- Webb Co. vs. Gonzales, 69 Tex. 455, Sec. 172.
- Webbe vs. Romona Oolitic Stone Co., 58 Ill. App. 226, Sec. 57.
- Weher vs. North, 51 Iowa 375, Sec. 217.
 vs. Roland, 39 Pa. Sup. Ct. 611, Sec. 122.
- Webber vs. Wilcox, 45 Cal. 301, Sec. 195.
- Webster vs. Washington Co., 26 Minn. 220, Sec. 173.
- Weed vs. Bentley, 6 Hill (N. Y.) 56, Sec. 15, 105.
 vs. Chambers, 40 Up. Can. (Q. B.) 1, Sec. 55.
- Weed Sewing Machine Co. vs. Jeudevine, 39 Mich. 590, Sec. 123.
 vs. Maxwell, 63 Mo. 486, Sec. 104.
- Wegner vs. State, 28 Tex. App. 419, Sec. 20, 229.
- Wehrung vs. Denham, 42 Ore. 386, Sec. 76-b.
- Weidemeyer vs. Landon, 66 Mo. App. 520, Sec. 269.
- Weierhauser vs. Cole, 132 Iowa 14, Sec. 197.
- Weibe vs. Statham, 67 Cal. 84, Sec. 220.
- Weightman vs. Union Trust Co., 208 Pa. 449, Sec. 131.
- Weir Plow Co. vs. Walmsly, 110 Ind. 242, Sec. 17, 55, 73.
- Weik vs. Pugh, 92 Ind. 382, Sec. 98.
- Weinbrinner vs. Weisiger, 3 T. B. Mon. (Ky.) 35, Sec. 133.
- Weintz vs. Kramer, 44 La. Ann. 35, Sec. 171.

(References are to sections.)

- Weisel vs. Spence, 59 Wis. 301, Sec. 41.
- Weiss vs. Leichter, 113 N. Y. S. 999, Sec. 79.
 vs. U. S. F. & G. Co., 300 Ill. 11, Sec. 135.
 vs. Walsh, 177 Mass. 555, Sec. 67, 95.
- Welsh vs. Ebersole, 75 Va. 656, Sec. 6.
- Weldin vs. Porter, 4 Houst. 236, Sec. 27.
- Wells vs. Mann, 45 N. Y. 327, Sec. 116.
 vs. Miller, 66 N. Y. 255, Sec. 262.
 vs. Monihan, 129 N. Y. 161, Sec. 46.
 vs. State, 175 Ind. 380, Sec. 145.
- Wells, Fargo & Co. vs. Walker, 9 N. M. 456, Sec. 106.
- Wendlandt vs. Sohre, 37 Minn. 162, Sec. 5.
- Wertheimer vs. Howard, 30 Mo. 420, Sec. 169.
- Werner vs. Graley, 54 Kan. 383, Sec. 214.
- West vs. Bank, 19 Vt. 403, Sec. 252, 261.
 vs. Brison, 99 Mo. 684, Sec. 113.
 vs. Carter, 129 Ill. 249, Sec. 190.
 vs. Chasten, 12 Fla. 315, Sec. 23, 115.
- Westfall vs. Albert, 212 Ill. 68, Sec. 135.
- Westerman vs. Means, 12 Pa. 97, Sec. 135.
- Westbrook vs. Miller, 56 Mich. 148, Sec. 147.
- Western Bldg. & Loan Assn. vs. Fitzmaurice, 7 Mo. App. 283, Sec. 133.
- Western Maryland R. R. Co. vs. Blue Ridge Hotel Co., 102 Md. 307, Sec. 11.
- Western N. Y. Life Ins. Co. vs. Clinton, 66 N. Y. 326, Sec. 15.
- Westervelt vs. Frost, 1 Abb. Pr. (N. Y.) 74, Sec. 139.
 vs. Mohrenstecher, 76 Fed. 118, Sec. 129.
- Westinghouse Electric & Mfg. Co. vs. R. Co., 228 Fed. 978, Sec. 253.
- Westmorland vs. Westmorland, 92 Ga. 233, Sec. 133.
- Wesley Church vs. Moore, 10 Pa. 273, Sec. 261, 279.
- Wessel vs. Glenn, 108 Pa. 104, Sec. 109.
- Wetherwax vs. Paine, 2 Mich. 559, Sec. 10.
- Weyant vs. Utah Savings & Trust Co., 54 Utah 181, Sec. 221.
- Whan vs. Irwin, 27 La. Ann. 706, Sec. 188.
- Wheat vs. Dingle, 32 S. C. 473, Sec. 252.
 vs. Kendall, 6 N. H. 504, Sec. 90.
- Wheeler vs. Fuller, 4 Ala. App. 532, Sec. 188.
 vs. Hawkins, 116 Ind. 515, Sec. 248.
 vs. Mayfield, 31 Tex. 395, Sec. 51.
 vs. McCabe, 47 How. Pr. (N. Y.) 283, Sec. 184.
 vs. Meyer, 95 Mich. 36, Sec. 134.
 vs. Traders Deposit Bank, 107 Ky. 653, Sec. 108.
- Wheeler & Wilson Mfg. Co. vs. Brown, 65 Wis. 99, Sec. 132.
- Wheeling vs. Black, 25 W. Va. 266, Sec. 160.
- Whereatt vs. Ellis, 103 Wis. 348, Sec. 126, 137, 188.
- White vs. Banks, 21 Ala. 705, Sec. 262.
 vs. Baugh, 3 Clark & F. 44, Sec. 243-a.
 vs. Bowman, 78 Tenn. 55, Sec. 143.
 vs. Ditson, 140 Mass. 351, Sec. 218.
 vs. Duggan, 140 Mass. 18, Sec. 20, 74, 109.

(References are to sections.)

- White vs. East Saginaw, 43 Mich. 567, Sec. 152.
 vs. Howd, 66 Conn. 264, Sec. 180.
 vs. Miller, 47 Ind. 385, Sec. 280.
 vs. Reed, 15 Conn. 457, Sec. 18, 50, 60.
 vs. State, 44 Ala. 409, Sec. 147.
 vs. Walker, 31 Ill. 422, Sec. 68.
 vs. Weatherbee, 126 Mass. 450, Sec. 19.
 White's Adm. vs. Life Assn. of Amer., 63 Ala. 423, Sec. 6.
 White's Bank vs. Myles, 73 N. Y. 335, Sec. 59.
 White's Case, 6 Mod. 18, Sec. 145.
 White River L. & W. R. R. vs. Star R. & L. Co., 77 Ark. 128, Sec. 76.
 White Sewing Machine Co. vs. Dakin, 86 Mich. 581, Sec. 133.
 vs. Hines, 61 Mich. 423, Sec. 53.
 vs. Mullins, 41 Mich. 339, Sec. 132.
 vs. Saxon, 121 Ala. 399, Sec. 23-a.
 Whitehead vs. Cape Henry Syndicate, 111 Va. 193, Sec. 196.
 vs. Tulane, 11 La. Ann. 302, Sec. 193.
 Whiteside vs. Noyac Cottage Assn., 84 Hun 555, Sec. 197.
 Whitworth vs. Carter, 43 Miss. 61, Sec. 104.
 vs. Tilman, 40 Miss. 76, Sec. 283.
 Whittall-Tatum Co. vs. Manix, 113 N. Y. S. 1010, Sec. 48.
 Whittemore vs. Wentworth, 76 Me. 20, Sec. 38.
 Whitney vs. Groot, 24 Wend. 82, Sec. 59, 66.
 Whiton vs. Mears, 11 Met. 563, Sec. 67, 68.
 Whitcher vs. James Hall, 5 Barn. & Cr. 269, Sec. 73, 79.
 Whitaker vs. Kirby, 54 Ga. 277, Sec. 113.
 vs. Richards, 134 Pa. St. 191, Sec. 11, 109.
 Whitsell vs. Mebane, 64 N. C. 345, Sec. 123.
 Whitfield vs. Evans, 56 Miss. 488, Sec. 220.
 Whitridge vs. Durkee, 2 Md. Ch. 442, Sec. 115.
 Wiggins' Appeal, 100 Pa. 155, Sec. 104.
 Williams vs. Boyd, 75 Ind. 286, Sec. 23, 90.
 vs. Ewing, 31 Ark. 229, Sec. 273, 276.
 vs. Fidelity & Deposit Co., 42 Col. 118, Sec. 188.
 vs. Flippin, 68 Miss. 680, Sec. 178.
 vs. Gilchrist, 11 N. H. 535, Sec. 97.
 vs. Gooch, 73 Ill. App. 557, Sec. 94.
 vs. Harrison, 11 S. C. 412, Sec. 11.
 vs. Kennedy, 134 Ga. 339, Sec. 95.
 vs. Leper, 3 Burrows 1886, Sec. 39.
 vs. Morris, 95 U. S. 456, Sec. 29.
 vs. Morris, 99 Ark. 319, Sec. 109.
 vs. Morton, 38 Me. 47, Sec. 154.
 vs. Ogg & Keith Lumber Co., 42 Tex. Civ. App. 558, Sec. 115.
 vs. Owen, 13 Simons 597, Sec. 250.
 vs. Perkins, 21 Ark. 18, Sec. 16.
 vs. Riehl, 127 Cal. 365, Sec. 249, 274.

(References are to sections.)

- Williams vs. St. L. I. M. & S. Ry., 8 Mo. App. 135, Sec. 215.
 vs. Tipton, 5 Humph. (Tenn.) 66, Sec. 280.
- Williamson vs. Hall, 1 O. S. 190, Sec. 194.
 vs. Rexroat, 55 Ill. App. 116, Sec. 41.
 vs. Woodman, 73 Me. 163, Sec. 19.
- Wills vs. Brown, 118 Mass. 137, Sec. 41.
 vs. Cutler, 61 N. H. 405, Sec. 39.
 vs. Ross, 77 Ind. 1, Sec. 17, 50.
- Willis vs. Chowning, 90 Tex. 617, Sec. 95.
 vs. Davis, 3 Minn. 17, Sec. 98.
 vs. Ellis, 98 Miss. 197, Sec. 28.
 vs. Willis, 42 W. Va. 522, Sec. 278.
- Wilkinson vs. Conley, 133 Ga. 518, Sec. 113.
 vs. Evans, L. R., 1 C. P. 407, Sec. 29.
 vs. McKimmie, 36 App. D. C. 336, Sec. 72, 79.
- Wilkerson vs. Hood, 65 Mo. App. 491, Sec. 14.
- Willoughby vs. Ball, 18 Okl. 535, Sec. 117.
- Wilkins vs. Aikin, 17 Ves. Jr. 422, Sec. 179.
 vs. Bank, 31 O. S. 565, Sec. 117.
 vs. Carter, 84 Tex. 438, Sec. 66.
 vs. Conley, 133 Ga. 518, Sec. 113.
- Wilcox vs. Campbell, 106 N. Y. 325, Sec. 23.
 vs. Draper, 12 Neb. 138, Sec. 66.
 vs. Fairhaven Bank, 7 Allen 270, Sec. 96, 245.
- Wile vs. Kock, 54 O. S. 608, Sec. 183.
- Wiley vs. Baumgardner, 97 Ind. 66, Sec. 138.
- Wilbur vs. Williams, 16 R. I. 242, Sec. 99.
- Willard vs. Wood, 135 U. S. 309, Sec. 142.
- Wilcus vs. Kling, 87 Ill. 107, Sec. 135.
- Wiles vs. Dudlow, L. R., 19 Eq. 198, Sec. 32, 265.
- Wild vs. Howe, 74 Mo. 551, Sec. 83.
- Wilds vs. Attix, 4 Del. Ch. 253, Sec. 115.
- Wilkes-Barre vs. Rockafellow, 171 Pa. 177, Sec. 160.
- Wilmington R. R. Co. vs. Ling, 18 S. C. 116, Sec. 107.
- Wilson vs. Brown, 13 N. J. Eq. 277, Sec. 259.
 vs. Crawford, 47 Iowa 469, Sec. 280.
 vs. Glenn, 77 Ind. 585, Sec. 188.
 vs. Hendee, 74 N. J. L. 640, Sec. 278.
 vs. Hite's Exr., 157 S. W. 41, Sec. 282.
 vs. Lloyd, 16 Law Rep. Eq. 60, Sec. 23.
 vs. McVey, 83 Ind. 108, Sec. 96.
 vs. Marsh, 34 Vt. 352, Sec. 169.
 vs. Monticello, 85 Ind. 10, Sec. 106.
 vs. Outlaw, Minor's Rep. 367, Sec. 198.
 vs. People, 19 Col. 199, Sec. 166.
 vs. Root, 43 Ind. 486, Sec. 208.
 vs. Spencer, 91 Neb. 169, Sec. 160.

(References are to sections.)

- Wilson vs. State, 67 Kas. 44, Sec. 163.
 vs. Stewart, 24 O. S. 504, Sec. 274.
 vs. White, 82 Ark. 407, Sec. 95.
 vs. Whitmore, 92 Hun 466, Sec. 131.
 vs. Wichita Co., 67 Tex. 647, Sec. 160, 166.
 vs. Wilson, 17 O. S. 150, Sec. 222.
 Willson vs. McEvoy, 25 Cal. 169, Sec. 197.
 Windhorst vs. Bergendahl, 21 S. D. 218, Sec. 83.
 Winter & Co. vs. Forrest, 145 Ky. 581, Sec. 106.
 Winn vs. Albert, 2 Md. Ch. Dec. 169, Sec. 46.
 vs. Sanford, 145 Mass. 302, Sec. 11-a, 104.
 Winnebago Paper Mills vs. Travis, 56 Minn. 480, Sec. 66.
 Winsted Bank vs. Webb, 39 N. Y. 325, Sec. 97.
 Winston vs. Yeargin, 50 Ala. 340, Sec. 98, 257.
 Winslow vs. Wood, 70 N. C. 430, Sec. 126.
 Wingate vs. Waite, 6 M. & W. 739, Sec. 168.
 Winchester vs. Beardin, 10 Humph. (Tenn.) 247, Sec. 254.
 Winship vs. Bass, 12 Mass. 199, Sec. 218.
 Winterfield vs. Cream City Brewing Co., 96 Wis. 239, Sec. 11.
 Wise vs. Miller, 45 O. S. 388, Sec. 66.
 Wiser vs. Blachly, 1 Johns. Ch. 607, Sec. 17.
 Wiseman vs. Lynn, 39 Ind. 250, Sec. 212.
 vs. Swain, 114 S. W. 145, Sec. 218, 221.
 vs. Thompson, 94 Iowa 607, Sec. 46.
 Withers vs. Berry, 25 Kan. 373, Sec. 67.
 Witkowski vs. Hern, 82 Cal. 604, Sec. 159.
 Witmer vs. Ellison, 71 Ill. 301, Sec. 83.
 Witt Shoe Co. vs. Peacock, 150 N. C. 545, Sec. 50.
 Witthaus vs. Zimmerman, 9 App. Div. (N. Y.) 202, Sec. 287.
 Wittich vs. O'Neal, 22 Fla. 592, Sec. 197.
 Wolf vs. Aetna Indemnity Co., 163 Cal. 597, Sec. 76-a.
 vs. Des Moines & Ft. Dodge Ry. Co., 64 Iowa 380, Sec. 135.
 vs. Stix, 99 U. S. 1, Sec. 100.
 Wolfe vs. McClure, 79 Ill. 564, Sec. 139.
 Wolmershausen vs. Gullick, L. R., 2 Ch. Div. 514 (1893), Sec. 270, 277.
 Walters vs. Henningsan, 114 Cal. 433, Sec. 266.
 Wolverton vs. Davis, 85 Va. 64, Sec. 265.
 Wolstenholme vs. Smith, 34 Utah 300, Sec. 91-a.
 Womack vs. Paxton, 84 Va. 9, Sec. 115.
 Wood vs. Brown, 104 Fed. 203, Sec. 98.
 vs. Coman, 56 Ala. 283, Sec. 212.
 vs. Comm., 33 S. W. (Ky.) 729, Sec. 232.
 vs. Chetwood, 44 N. J. Eq. 64, Sec. 121, 123.
 vs. Farmer, 200 Mass. 209, Sec. 68.
 vs. Farnell, 50 Ala. 546, Sec. 169.
 vs. Fisk, 63 N. Y. 245, Sec. 69.
 vs. Fulton, 2 Harr. & G. (Md.) 71, Sec. 188.
 vs. Hollander, 84 Tex. 394, Sec. 196.
 vs. Leland, 1 Met. 387, Sec. 279.

(References are to sections.)

- Wood vs. Midgley, 5 De G. M. & G. 41, Sec. 29.
 vs. Newkirk, 15 O. S. 295, Sec. 83.
 vs. Orford, 56 Cal. 157, Sec. 185.
 vs. Priestner, L. R., 2 Ex. 66, Sec. 59.
 vs. State, 66 Md. 61, Sec. 196.
 vs. Steele, 6 Wall. 80, Sec. 73.
- Wood, In re, 1 DeG. J. & S. 465, Sec. 259.
- Woods vs. Sherman, 71 Pa. 100, Sec. 63.
 vs. State, 51 Tex. Cr. Rep. 595, Sec. 231, 232.
- Woodstock Bank vs. Downer, 27 Vt. 539, Sec. 61, 66.
- Woodburn vs. Carter, 50 Ind. 376, Sec. 83.
- Woodward vs. Paine, 15 Johns. 493, Sec. 168.
 vs. Pell, L. R., 4 Q. B. 55, Sec. 251.
- Woodhouse vs. Shepley, 2 Atk. 536, Sec. 138.
- Woodman vs. Mooring, 3 Dev. Law (N. C.) 237, Sec. 140.
- Woodruff vs. Scaife, 83 Ala. 152, Sec. 40.
 vs. Schultz, 155 Mich. 11, Sec. 76-a.
- Wooddell vs. Bruffy, 25 W. Va. 465, Sec. 157.
- Woolfolk vs. Plant, 46 Ga. 422, Sec. 84.
 vs. State, 10 Ind. 532, Sec. 232.
- Wooldridge vs. Norris, L. R., 6 Eq. Cases 410, Sec. 115, 281.
- Worden vs. Klag, 13 Ohio C. C. 627, Sec. 192.
- Worcester Mechanics Sav. Bank vs. Hill, 113 Mass. 25, Sec. 16, 57.
- Work vs. Cowhick, 81 Ill. 317, Sec. 29.
- Worrall vs. Munn, 5 N. Y. 229, Sec. 30.
- Worth vs. Cox, 89 N. C. 44, Sec. 87.
- Worthy vs. Barrett, 63 N. C. 199, Sec. 145.
 vs. Brower, 93 N. C. 344, Sec. 217.
- Wormley vs. Wormley, 96 Ill. 129, Sec. 181.
- Wormer vs. Waterloo Agricultural Works, 62 Iowa 699, Sec. 259.
- Wren vs. Pearce, 4 Smed. & M. 91, Sec. 27.
- Wright vs. Dannah, 2 Camp. 203, Sec. 22.
 vs. Deaver, 52 Tex. Civ. App. 130, Sec. 81.
 vs. Dyer, 48 Mo. 525, Sec. 67.
 vs. Griffith, 121 Ind. 478, Sec. 59, 66.
 vs. Keyes, 103 Pa. 567, Sec. 199, 201.
 vs. Knepper, 1 Barr. (Pa.) 361, Sec. 100.
 vs. Lang, 66 Ala. 389, Sec. 218.
 vs. Marvin, 59 Vt. 437, Sec. 212.
 vs. Morley, 11 Ves. 22, Sec. 256.
 vs. Morse, 9 Gray 337, Sec. 8.
 vs. Russel, 2 W. Bl. 934, Sec. 52.
 vs. Shorter, 56 Ga. 72, Sec. 67.
 vs. State, 79 Ala. 262, Sec. 40.
 vs. Stockton, 5 Leigh (Va.) 153, Sec. 114.
- Wronkow vs. Oakley, 133 N. Y. 505, Sec. 189.
- Wulff vs. Jay, 7 L. R. Q. B. 756, Sec. 99, 257.

(References are to sections.)

- Wurtz vs. Hart, 13 Iowa 515, Sec. 252.
 W. U. Tel. Co. vs. C. P. R. R. Co., 86 Ill. 246, Sec. 28.
 Wyatt vs. Dufrene, 106 Ill. App. 214, Sec. 83, 90.
 Wybrants vs. Lutch, 24 Tex. 309, Sec. 91.
 Wyman vs. Goodrich, 26 Wis. 21, Sec. 42.
 vs. Robinson, 73 Me. 384, Sec. 217.
 Wynn vs. Brooke, 5 Rawle (Pa.) 106, Sec. 283.
 vs. Wood, 97 Pa. 216, Sec. 43.

X

- Xander vs. Commonwealth, 102 Pa. 434, Sec. 133.

Y

- Yager vs. Kentucky Title Co., 112 Ky. 932, Sec. 95.
 Yale vs. Baum, 70 Miss. 225, Sec. 193.
 Yancey vs. Brown, 3 Sneed 89, Sec. 66.
 Yarbrough vs. Comm., 89 Ky. 151, Sec. 232.
 Yates vs. Burch, 87 N. Y. 409, Sec. 188.
 vs. Mead, 68 Miss. 787, Sec. 251.
 Yazoo & M. V. R. R. Co. vs. Adams, 78 Miss. 977, Sec. 193.
 Yeary vs. Smith, 45 Tex. 56, Sec. 81.
 Yerby vs. Grigsby, 9 Leigh 387, Sec. 30.
 Yerxa vs. Ruthruff, 19 N. D. 13, Sec. 95.
 Yoder vs. Briggs, 3 Bibb (Ky.) 228, Sec. 279.
 Y. M. C. A. vs. Ritter, 90 Kas. 333, Sec. 99.
 Yorkshire Ry. Wagon Co. vs. Maclure, L. R., 19 Ch. 478, Sec. 104.
 Young vs. American Bonding Co., 228 Pa. 373, Sec. 73, 76-a, 233, 238.
 vs. Brown, 53 Wis. 333, Sec. 59.
 vs. Duhme, 61 Ky. 239, Sec. 220.
 vs. Lyons, 8 Gill. (Md.) 162, Sec. 273.
 vs. Morgan, 89 Ill. 199, Sec. 259.
 vs. Shunk, 30 Minn. 503, Sec. 263.
 vs. State, 7 Gill. & Johns. (Md.) 253, Sec. 148.
 vs. Vough, 23 N. J. Eq. 325, Sec. 244.
 Young, Admr., vs. Patterson, 165 Pa. 423, Sec. 142.
 Youngs vs. McDonald, 67 N. Y. S. 375, Sec. 197.

Z

- Zane vs. Kennedy, 73 Pa. 182, Sec. 82.
 Zechman vs. Haak, 85 Wis. 656, Sec. 199.
 Zeigler vs. Henry, 77 Mich. 480, Sec. 188.
 Ziegler vs. Hallahan, 131 Fed. 210, Sec. 76-a, 79.
 Zollickoffer vs. Seth, 44 Md. 359, Sec. 273, 280.

INDEX

(The references are to pages.)

A

Absence From Jurisdiction—

as affecting right of contribution between co-sureties, 490.

Absolute Guaranty—

defined, 73.

distinguished from guaranty of collectibility, 6n.

not necessary to pursue and exhaust the principal before proceeding against an absolute guarantor, 73.

notice of acceptance, not required if guaranty is absolute, 83.

Acceptance—

verbal acceptance is not within the Statute of Frauds where the acceptor holds funds of the drawer to meet the bill, 50.

suretyship undertaking not binding until accepted by the obligee, 194.

retention of bond by obligee *prima facie* evidence of acceptance, 194.

view that accommodation acceptor is entitled by subrogation to securities in the hands of the holder, 449n.

Notice of acceptance of guaranty, 77.

when necessary to charge the guarantor, 77.

whether contract of guaranty in respect to notice of acceptance is different from any other contract, 78.

Federal Court rule as to notice of acceptance of guaranty, 80.

rule in the State Courts, 83.

not required if the guaranty is absolute, 83.

not required if there is a consideration moving to the grantor from the creditor, 82.

view that a letter of credit for future advances is a mere offer to contract which requires an acceptance to become binding, 84.

Accident—

sureties not liable for loss of trust funds by inevitable accident, 206.
mutilation of bond by accident, not a defense to sureties, 253.

Accommodation Indorser (See Irregular Indorser)—

accommodation indorsement in blank may be shown by parol to be the contract of a regular indorser, 167.

successive accommodation indorsers, not liable in contribution, 480, 501.

Act of God—

loss resulting from, not chargeable to public officer or his sureties, 286.

(The references are to pages.)

Actions—

at common law only joint actions could be brought to enforce joint liability, 180.

where a bond secures separate rights the remedy of the obligee must be by separate actions, 233.

summary action upon appeal bonds, 328.

When cause of action arises upon a suretyship undertaking.

upon bond of indemnity to "save harmless," not until obligee has suffered damages, 230.

limitations upon actions against sureties upon official bonds, 305.

bond for appeal or stay of execution, 327.

not necessary to make demand upon principal before beginning action upon appeal bond, 328.

injunction bonds, 339.

no action upon injunction bond can be maintained until the final determination of the cause, 343.

attachment bonds, 358.

when contribution between co-sureties may be enforced, 486.

action for indemnity, 507.

Parties to actions upon bonds, 231.

bond to administrator or guardian in representative capacity, may be sued upon in individual capacity, 232.

if obligee is deceased, his administrator may sue on bond, 232.

as affected by the fact that the instrument is under seal, 231.

creditors, legatees and heirs may sue upon administration bonds, 386.

co-administrator may maintain action on bond for conversion of his associate, 386.

Additional Security—

promisor not released by the creditor taking additional security, 135.

Administrators (See Executors and Administrators)—

Admissions—

of principal, not competent against sureties, to establish default, 298.

entries in books of principal, competent as admissions, 299.

if principal and surety are sued jointly, admissions of principal are competent, 300.

Advancements—

when a guarantor is entitled to notice of advancements made under the guaranty, 78.

guarantor discharged by alterations in the principal contract as to the amount of advancements by creditor, 108

Affirmance—

what constitutes, 322.

as to part of relief granted in lower court, a *pro tanto* breach of bond in appeal, 323.

as to one or more of the parties and reversal as to others, a breach of bond, 323.

* by failure to prosecute appeal, 324.

dismissal for want of prosecution, a constructive affirmance, 324.

dismissal for want of jurisdiction, not a constructive affirmance, 324.

failure to prosecute appeal arising from no fault of the appellant, not a constructive affirmance, 325.

entered by consent or compromise, not a breach of bond, 325.

dismissal of appeal for want of capacity of appellant to prosecute, considered a constructive affirmance, 327.

(The references are to pages.)

Agents—

contracts in suretyship, executed by, 23, 36, 468.
 neither the principal nor the creditor can act as agent of the promisor in executing suretyship contracts, 23, 24.
 not necessary that the authority of the agent be in writing, 24, 36.
 the Statute of Frauds in some States requires the agent's authority to be in writing, 28.
 if agency of one executing suretyship engagement is unauthorized, a subsequent ratification will validate the transaction, 36, 192.
 contract of a *del credere* agent, not within the Statute of Frauds and need not be in writing, 51.
 who advances payment for account of his principal, not a volunteer, and entitled to subrogation, 469.
 unauthorized statements by agents do not bind creditor, 155.

Agreement—

meaning and scope of the word as used in the Statute of Frauds, 29.
 view that the Statute of Frauds requires the entire agreement to pay the debt of another to be set out in the writing, 30.
 view that the agreement need not be in writing, 30, 31.
 rule in Massachusetts that the Statute of Frauds employs the word "agreement" as synonymous with promise, and that the consideration need not be recited therein, 31.
 the Statute in terms merely requires a "memorandum" of the agreement to be in writing, and not the entire contract, 33.

Alteration—

material alteration defined, 98.
 promisor discharged by material alterations of the principal contract, even though such alterations are beneficial to promisor, 100n, 110, 211.
 alterations in building contracts, 107a, 107b, 107c, 107d.
 change in the place of payment of the principal obligation is material, 101.
 changing date of maturity is material, 101.
 pasting to original contract memorandum intended to clarify the contract, not an alteration, 102.
 material alterations discharge the promisor whether made before or after delivery to the creditor, 102.
 delivery by promisor of incomplete suretyship contract carries implied authority to the holder to fill up the instrument, 21 103, 253.
 same effect given to alterations whether made by debtor or creditor, 103.
 change or mutilation by stranger, 104, 215.
 erasure of name of one surety discharges others, 106, 171n.
 as affected by the absence of fraudulent intent, 104.
 if alteration is the result of accident or mistake, equity will reform the contract, 104.
 immaterial alteration, though fraudulent, disregarded, 105.
 addition of a new party as a principal maker is a material alteration, 105.
 addition of new party as surety or guarantor not a material alteration, 106, 253.
 change in the duties of the principal, 106, 212.
 change in the duties of public officers by subsequent legislation, 107a, 253.
 promisor not released by alterations which are stipulated in the main contract, 108.
 variation in the amount of advancements by the creditor, is a material alteration, 108, 109.

(The references are to pages.)

Alterations—Continued—

- failure of parties to perform the principal contract, not an alteration, 108.
- substitution of new parties is a material alteration, 109.
- change or enlargement of the business of creditor as a defense to promisor, 113, 212.
- agreement to extend time of the main contract, is a material alteration, 114.
- change in the amount of compensation of principal, not a material alteration, 214.
- in bonds after delivery, will avoid undertaking, 214, 252, 319, 373.
- immaterial alterations, will not invalidate bond, 215.

Ambiguous Words—

- meaning of, will be ascertained if possible in construing suretyship contracts, 17, 59, 203.
- will be given such meaning as will prevent forfeiture, 18, 344.
- view that ambiguities should be construed most strongly against the promisor, 19, 59.
- view that ambiguous words should be construed most strongly in favor of the promisor, 20a, 59n.
- construction as affected by the fact that the contract is drawn by the surety, 415.

Amendment—

- exoneration of sureties by amendment to process or pleadings, 363.

Amercement—

- record of, against public officer, held admissible against his surety, 302, 303n.

Ancillary Administration—

- bond of ancillary administrator, not cumulative with bond of principal administration, 381.

Annuity—

- measure of damages upon bond to secure an annuity is the amount of payments in default and not the penal sum named, 218n.

Anomalous Indorser (See Irregular Indorser)—

Appeal and Stay Bonds—

- distinction between appeal and stay of execution, 312.
- use of the term appeal interchangeably with supersedeas, 312.
- instances where appeal vacates the judgment, 312.
- appeal is a matter of right and the remedy, though groundless, can not be denied, 313.
- conditions upon which appeal bonds become payable, 322.
- corporation signing appeal bond as surety, not estopped from showing the act to be *ultra vires*, 319.
- Statutory requirements as to appeal*, 314.
- limitation of time for filing, 314.
- requirements for approval, 314.
- failure to approve bond, not a defense to the surety, 314n.
- dismissal of judicial proceedings for failure to comply with the law, 314.
- justification of sureties, 315.
- giving bond for smaller sum than is required by law, 315.
- giving bond for larger sum than is required by law, 316.
- statutory provision as to residence of surety, 316.
- persons prohibited by law or rules of court from becoming surety, 316.

(The references are to pages.)

Appeal and Stay Bonds—Continued—

statutes requiring the fixing of penalty of bond by the court, 317.
 regulation by statute as to the number of sureties, 317.
 waiver of defects by acts of the obligee, 320.
 judgment entered by consent of parties not a breach of appeal bond, 325.

where appeal has been dismissed and thereafter reinstated by agreement of parties, 327.

want of capacity to prosecute appeal, a breach of the bond, 327.

Action upon bond for appeal, 327.

when may be brought, 327.

effect of levy of execution upon property of principal as to right of action upon bond, 327.

not necessary to first make demand upon the principal before proceeding against surety, 328.

not necessary for obligee to first proceed against other security before proceeding against surety, 328.

summary action upon appeal bonds, 328.

Judgment in appellate court conclusive against surety, 329.

Measure of damages for breach, 329.

limited in any event to the amount the law requires to be secured, 329.

limited to the express words recited in the bond, 329.

will include all the requirements of the law, although some are omitted from the bond, 330.

in foreclosure, or where property is in custody of officer of court, limited to damages resulting from appellate proceeding, 330.

does not cover interest nor rents and profits of the land in foreclosure proceedings in Federal court, 330.

does not cover deficiency in foreclosure proceedings, where no personal judgment is rendered, 331.

does not include deficiency in action to foreclose mechanic's lien, 332.

where one appeals in the interest of a trust, limited to the value of the assets belonging to the trust, 332.

includes rents and profits in an action of ejectment, 332.

attorney's fees resisting appeal, not included, 333.

nominal damages recoverable although defendant pays judgment, 333.

includes entire judgment—although in excess of amount appealed from, 333.

includes interest upon amount of penalty after the time when the surety should have paid it, 333.

Successive appeal bonds, 334.

are cumulative, 334.

last sureties are principal obligors and the first, sureties for them, 334.

where new trial is granted and same judgment rendered upon retrial upon which error is prosecuted the first bond remains liable, 335.

joint action may be prosecuted upon successive bonds, 335.

subrogation between successive appeal bonds, 433.

Defenses in actions upon appeal bonds, 335.

all issuable facts necessary to the validity of the judgment are settled by affirmance of the judgment, 335.

sureties not estopped from showing fraud and collusion in obtaining the judgment appealed from, 336.

want of jurisdiction in the appellate court, not a defense to sureties where judgment has been affirmed, 336.

(The references are to pages.)

Appeal and Stay Bonds—Continued—

Justice court appeal, 336.

vacates judgment and all orders of magistrate, 336.

statutory requirements as to time of filing bond are mandatory, 337.

Consideration, 318.

bond for which there is no requirement of law, void for want of consideration, 318.

bond by administrator in appeal who is exempt by reason of having given administration bond, without consideration, 318.

supersedes bond void for want of consideration if former appeal operates as stay of execution, 318.

where judgment appealed from is a nullity by reason of want of jurisdiction, bond is wanting in consideration, 318.

Material defects in form of bond, 317.

distinctions between defects which invalidate the bond and those which merely furnish grounds for dismissal of action, 317.

bonds lacking formalities of contract can not be enforced, 317.

omission of defeasance clause, 318.

omission of name of judgment creditor, 318.

reciting the name of an appellate court which has no existence, 319.

exacting more onerous conditions than the law requires, 319.

Immaterial defects in the contract, 319.

forfeitures not favored, 319.

wrong date of judgment set out in the bond, 319.

omission of appellant's name from the bond, 319, 320.

omission of name of appellate court, 320.

failure of some of the obligors to sign, 320.

Affirmance, 322.

to constitute breach of bond affirmance must be such final order as gives the plaintiff right of execution, 322.

entering an original judgment in the appellate court is not an "affirmance," 322.

where only part of relief asked for is granted in the reviewing court, 323.

affirmance as to one or more of the parties and reversal as to others, a breach of the bond, 323.

affirmance as the result of a failure to prosecute appeal, 324.

affirmance by consent of parties, not a breach of appeal bond, 325.

agreement that action may abide the outcome of a test case, not a compromise, 326, 327.

Failure to perfect appeal, 320.

want of jurisdiction in the appellate court resulting in dismissal creates no liability on the bond, 321, 324.

perfecting appeal by consent of obligee after the date limited by law, 321.

obligors estopped by recitals in the bond that appeal has been perfected, 321.

failure to make all parties of the lower court parties in the reviewing court, 321.

where appeal is entertained and judgment affirmed, sureties estopped from showing the appeal not perfected, 336.

Failure to prosecute appeal, 324.

dismissal of appeal for want of prosecution, a constructive affirmance, 324.

dismissal of appeal for want of jurisdiction, not a constructive affirmance, 324.

where appellant is restrained by injunction from prosecuting appeal, 325.

removal of case by act of legislature to new appellate court not named in the bond, 325.

(The references are to pages.)

Appearance—

time and place of appearance must be definitely stated in bail bonds, 392, 394.
place of appearance expressed in the alternative, void for uncertainty, 394.

Application of Payments—

application of payments by the law, where parties themselves make no application, 134.
in the absence of stipulations by the party paying, the creditor may apply to unsecured debt, 134.
a bank holding note of depositor, not under obligation to surety to apply deposits of principal in payment of note, 145.
if a note is payable at the bank, a failure to apply deposits in payment will discharge the surety, 146.
in the absence of stipulation promisor has no right to control application of collateral in the hands of creditor, 181.
promisor discharged if creditor fails to apply collateral as directed by principal, 182.
application of collateral can not be controlled after transaction is completed and security delivered, 182.

Approval—

failure of officer to approve a bond as required by law will not release the surety, 23, 248, 314n.
approval of bonds held to be judicial act, 247.
of bond, will be presumed from its acceptance and retention, 247.
where officer charged with the duty of approving a bond, his approval of insufficient sureties creates a liability upon his bond, 264.
appeal may be dismissed for non-compliance with statute as to approval of bond, 314.

Arbitration—

submission to arbitration resulting in dissolving injunction, does not constitute breach of the bond, 342.
sureties released upon attachment bonds by the submission of the case to arbitration, 364.

Arrest—

sureties upon bail bond exonerated by subsequent arrest of principal, 398.

Assignee—

surety of insolvent not discharged by failure of creditor to present claim against assignee, 132.

Assignment—

a general guaranty is assignable, 63.
a special guaranty is not assignable until right of action arises thereon, 64, 110.
when assignment of judgment against property of principal destroys the lien by merger and releases promisor, 144.
surety paying debt of another, entitled to have securities held by creditor assigned to him, 429, 434.

Assumption—

of mortgage by purchaser of land, places vendor in the situation of a surety, 443.

(The references are to pages.)

Attachment—

bonds not forfeited for irregularities of execution or defects in form, 352, 355.

want of jurisdiction resulting from defects in affidavit, a defense to sureties, 353.

release of sureties by substitution or addition of new parties, 358, 363.

sureties are concluded by judgment against the principal, 361.

good faith, or probable cause for attachment, not a defense to action upon bond, 361.

sureties estopped from questioning the regularity of proceedings out of which their liability arises, 362.

truth of affidavit for attachment can not be inquired into by the sureties, 362.

sureties can not show that property taken is not subject to attachment, 362.

no defense to sureties that officer levying writ acted without authority, 362.

liability of sureties as affected by reference of the case to arbitration, 364.

as affected by judgment against some and in favor of some defendants, 364.

attachment bonds available in any court to which the case goes by appeal or error, 364.

if judgment is appealed from, but not the attachment, judgment in the appellate court does not affect the attachment, 364.

***Bond to procure attachment*, 350.**

conditions of, 350.

malice need not be shown as a basis of recovery, 352.

will be binding, although executed after attachment is levied, 353.

whether damages for malicious prosecution are recoverable, 353.

judicial determination that the writ was wrongfully issued, constitutes a breach, 358.

voluntary dismissal of attachment, an admission that it is wrongful, 359.

failure of plaintiff to sustain his action, *prima facie* evidence that attachment is wrongful, 359.

dismissal of attachment by reason of failure of officer to properly serve, raises no presumption of wrongful process, 360, 364.

attachment upon defective affidavit is wrongful, 360.

action may be maintained on bond before final disposition of the case, if attachment dissolved, 360.

view that judgment in favor of principal, without adjudication of the attachment is a constructive dissolution, 361.

judicial sale conclusive against surety as to the value of the property, 356.

***Bond to discharge attachment*, 351, 356.**

is a final disposition of attachment proceeding, and an admission of the validity of the attachment, 356.

if attachment is void by reason of prohibition of law, bond to dissolve is void, 357.

a final judgment in favor of the plaintiff is a breach, 358.

***Bond to release attached property*, 350, 355.**

conditions of, 355.

redelivery bond does not affect the validity of attachment, and action for wrongful attachment may be thereafter maintained, 355.

there can be no recovery on redelivery bond unless property is actually delivered to the defendant, 356.

(The references are to pages.)

Attachment—Continued—

redelivery bond, written by mistake for discharge bond, 356.
no action can be maintained on redelivery bond until final disposition of the case, 360.

recitals in redelivery bond as to value of property conclusive upon the surety, 356.

Exoneration of sureties, 363.

by delivering up property seized under the writ, 363.

can not be exonerated *pro tanto* by delivery of part of attached property, 363.

sureties exonerated even though the property delivered is damaged while under attachment, 363.

discharge bond exonerated by a subsequent forthcoming bond, 363.

exoneration by amendment to process or pleadings, 363.

alteration of the return date of the writ as an exoneration, 363.

Measure of damages upon attachment bonds, 365.

actual damage of defendant from depreciation and loss of use of property recoverable, 365.

expenses of defendant, in securing a dissolution, an element of damage, 365.

annoyance and mortification to defendant, held an element of damages, 365.

speculative damages and injury to credit excluded, 365.

interest on money detained recoverable, 366.

expenses not recoverable where property does not belong to defendant, 366.

sureties upon forthcoming bond, liable only for nominal damages, where property incumbered by liens equal to its value, 366.

attorney fees in resisting attachment may be recovered, 366.

attorney fees incurred in the final hearing of the case not recoverable, 366.

Attorney—

is a public officer, 241.

not a justification to public officer that he was advised by his attorney to do a wrongful act, 376.

Attorney Fees—

in resisting appeal, not recoverable upon the bond, 333.

in procuring dissolution of injunction, recoverable on the bond, 348.

if injunction dissolved in the final hearing of the case, attorney fees not recoverable, 349.

if motion to dissolve injunction unsuccessful, attorney fees not allowed, although injunction is dissolved on final hearing, 349.

not allowed against sureties for services in modifying injunction, 349.

services in resisting allowance of injunction, not recoverable as damages, 350.

recoverable upon bond in attachment proceedings, 366.

in defending replevin, an element of damage in action upon bond, 373.

stipulated in promissory note, available to surety paying note, 439.

surety may recover contributory share of counsel fees from co-surety, 489.

Auditing Accounts—

promisor not discharged by failure of creditor to audit the accounts of principal, 162, 271.

(The references are to pages.)

B**Bail Bonds—**

bail defined, 391.
 granting bail a judicial act, 391.
 bail without order of court, a nullity, 391.
 bail ordered by officer acting without authority, a nullity, 392.
 if bond recites all necessary jurisdictional facts, sureties estopped from asserting lack of authority in officer to take bail, 392.
 surety upon bail bond has no right of indemnity against principal for amount paid upon a forfeited recognizance, 504.

Conditions in bail bonds, 392.

bond must stipulate a fixed time for appearance, 392.
 stipulation to appear at next term of court sufficiently definite, 392.
 bond remains in force from term to term if not renewed, 393.
 place of appearance must be definitely specified, 394.
 place of appearance described in the alternative, renders bond void, 394.
 order to appear before court which has no existence, a nullity, 394.
 change of venue without authority releases sureties, 394.
 change of venue by act of legislature does not release bail, 395.
 unauthorized conditions not required by law, considered surplusage, and of no effect upon liability of sureties, 395.

Defenses against bail bonds, 395.

stipulation between defendant and the prosecution postponing trial to some future term of court, will discharge the bail, 393.
 order of court changing the date of term of court, not a defense, 393.
 defective indictment or information, not a defense, 395.
 sureties held although bail is executed before accused is arrested, 395.
 bond specifying no offense, void, 396.
 bond for one offense and the indictment for another will invalidate bail, 396.
 bond to answer for an act which is not an offense, not binding on sureties, 396.
 failure to indict does not discharge bail, 397.
 no defense, that after bond was declared forfeited the accused appeared, 397.

Exoneration of bail, 397.

surrender of the accused to the proper public officer discharges bail, 397.
 sureties may at any time cause the arrest and commitment of the accused, 397.
 mere request for arrest will not exonerate bail, 398.
 death of the accused releases sureties, 398.
 subsequent escape after a surrender by the bail, will not revive liability, 398.
 confinement in the penitentiary of another State will not exonerate bail, 399.
 delivery of the accused to authorities of another State upon requisition, exonerates bail, 399.
 bail exonerated by the accused being adjudged a lunatic, 400.
 where accused places himself under military jurisdiction, his bond will be liable for his non-appearance, 400.
 escape of the accused after conviction, 400.
 if accused appears, pleads guilty and is sentenced, the bond is exonerated, 400.

(The references are to pages.)

Bank—

- a bank holding note of depositor is under no obligations to the surety to apply deposits of principal to the payment of note, 145.
- if note is payable at the bank a failure to apply deposit in payment will discharge surety, 146.
- sureties of public officer liable for loss of public funds by failure of bank, 280.
- relation of debtor and creditor between depositor and bank does not give bank any lien on deposit to secure loan to depositor, 465.

Bank Cashier—

- surety for fidelity of cashier held to be discharged where bank directors by exercise of diligence might have discovered a prior default, before accepting bond, 14.

Bankruptcy—

- discharge of principal debtor in bankruptcy does not discharge the promisor, 145.
- creditor may prove for entire claim, which is part secured by surety, although the secured part has been paid by surety, 451.
- creditors' right of subrogation where both principal and surety are in bankruptcy, 463.
- right of contribution not a provable debt in bankruptcy, where no payment is made until after discharge, 499.
- right of indemnity a provable claim in bankruptcy, 517.

Bills and Notes (See Promissory Note)—

Blank Indorsement—

- may be completed, either by the presumption of the law merchant, or by parol proof disclosing the intention of the parties, 21.

Bonds—

- a bond is a specialty, 190.
- form and execution of, 190.
- incomplete bonds will not be reformed by parol proof supplying omissions, 191.
- if name of surety is followed by words descriptive of official position, it will be binding as the personal obligation of the signer, 192.
- delivery and acceptance are necessary to the validity of a bond, 194, 204.
- possession of bond by obligee *prima facie* evidence of delivery and acceptance, 194.
- bonds delivered in incomplete form may be filled by holder so as to give them effect, 195.
- incorporation of other instruments by reference, 196.
- main contract which the bond secures, furnishes consideration for the bond, 198.
- contract already executed, not a consideration for a bond to secure it, 199.
- bonds obtained by fraud and misrepresentation, 200.
- parol proof in aid of construction of bonds, 202.
- commencement and duration of liability upon a bond, 204.
- alteration of principal contract as a defense to sureties upon a bond, 211.
- alteration in the bond as a defense to surety, 214.
- surety estopped from denying recitals of the bond, 215.
- to induce violation of the law, 222.
- to prevent performance of public duty, 225.
- to indemnify public officer against the consequences of an unlawful act already committed, 226.

(The references are to pages.)

Bonds—Continued—

when statute of limitations begins to run against surety upon bonds, 228.

who are proper parties in action upon bond, 231.

parties to actions upon bonds, as affected by the fact that the instrument is under seal, 232.

Judicial bonds, 308.

stay of execution on appeal, 312.

successive appeal bonds, 334.

bonds to procure injunction, 337.

attachment bonds, 350.

replevin bonds, 367.

administration bonds, 375.

guardian's bonds, 386.

insolvency bonds, 390.

bail bonds, 391.

Official bonds, 236.

valid although not conforming to statute, 242.

without seal, binding as a simple contract, 243.

given without requirement of law, 243.

required by unconstitutional statutes, invalid, 244.

bonds of deputies, 244.

Private obligations, bonds to secure, 188.

not retroactive unless the instrument so stipulates, 204.

will cover the office or employment so long as the tenure is continuous, unless limited by recitals in the instrument, 206.

bonds to secure building contracts, with covenants to pay labor and material claims, 207.

change in the amount of compensation of principal, will not discharge surety, 214.

measure of damages, 217.

measure of damages for breach of bond given to secure a due compliance with the law, 220.

Books of Account—

entries in books of principal, competent as admissions, to establish default, 299.

Breach of Contract—

failure by creditor to perform his contract with the principal will discharge the promisor, 109n.

Building Contracts—

surety not released by alterations stipulated for in the contract, 107c.

surety discharged by failure to hold back reserve payment stipulated in contract, 107a, 108, 112.

incorporation of the terms of a building contract into the bond to secure its performance, by reference, 197.

no consideration to support bond to secure building contract if bond not demanded till after execution of the main contract, 199.

if building contract is executed upon condition that bond will be furnished at later date, it is supported by sufficient consideration, 199.

surety upon building contract containing covenant to pay labor and material claims will be liable for such claims at the suit of labor and material men, 207.

payment of labor claims to prevent liens from being perfected creates no liability upon bond to "save harmless from liens," 210.

view that a municipality has no power to require contractor to furnish bond conditional upon the payment of labor and material claims, 208n.

(The references are to pages.)

Building Contracts—Continued—

- bond to save owner harmless against liens not available to lien holders, 211.
- distinction between bond to build and bond to indemnify against damages for not building, 210n.
- alterations in building contract as a defense to surety upon bond, 107a, 212.
- relaxation of rule when applied to corporate compensated surety, 107b.
- alterations of main contract does not release from liability to material men and labor, 107d.
- as to stipulations in building contracts for payment of fixed sum per day for delays, 219.
- surety subrogated to rights of creditor in reserve fund, 439.

Burden of Proof—

- in action upon a guaranty of collectibility the burden is on the creditor to show insolvency of the principal, 77.
- burden of proving failure or lack of consideration is on the one making the claims, 199.
- if jurisdiction to issue legal process is not apparent upon the writ, the burden of showing validity is upon the officer serving the process, 296.

By-Laws—

- surety of employee of corporation not discharged because the by-laws were not complied with by employee, 157.
- incorporation of the by-laws of a corporation into a bond, by reference, 198.

C

Cause of Action (See Actions)—

Clerk of Court—

- sureties of, liable for loss for improperly keeping court records, 264.
- liable for loss of papers resulting in damage to litigants, 264.
- not liable for failure to account for money received outside the scope of his office, 273.

Collateral Securities—

- contract of extension, not implied from giving collateral maturing at a later date, 120.
- giving of collateral is a good consideration for an agreement to extend time, 121.
- creditor is under no obligation to the promisor to sell collateral held as additional security, 142.
- defenses based upon the right of the promisor to control the application of collateral in the hands of creditor, 181.
- application of collateral can not be controlled after transaction is completed and security delivered, 182.
- creditor not obliged to resort to collateral in his hands before proceeding against the promisor, 183.
- promisor not subrogated to collateral in hands of creditor until all the debts covered by the collateral have been satisfied, 431.
- promisor paying debt of another, entitled to have collateral held by creditor assigned to him, 429, 434.
- creditor may have dividends from estate of insolvent debtor upon full amount of claim without first accounting for collateral, 452.
- creditor entitled to subrogation to securities held by surety, 459.

(The references are to pages.)

Collectibility—

- guaranty of collectibility, distinguished from a guaranty of payment, 6n, 74.
- guaranty of collectibility, conditional upon the exercise of diligence in trying to collect from the principal, 74.
- conflicting views as to whether execution and return of *nulla bona* is necessary in establishing non-collectibility as against the principal, 75, 76.

Colore Officii—

- defined, 274.
- conflicting views as to whether sheriff or constable is liable upon his bond for wrongs committed *colore officii*, 274, 279.

Commercial Guaranties—

- defined, 55.
- guarantor for one principal can not be held for joint principals, 65.
- guarantor for joint principals can not be held for advancements made to one, 65.
- advances made upon a partnership letter of credit after dissolution of the firm, without knowledge of the dissolution, 66.
- retrospective guaranties, 66.
- no privity of contract between principal and guarantor is necessary, 67.
- guarantor bound although the principal has no knowledge of the guaranty, 67.
- essential that the language of the guaranty amount to a promise to pay, 68.
- request to creditor to make advances on a letter of recommendation is not a guaranty, 69.
- transfer of obligations of third persons in settlement of debt, 69.
- guaranty will be regarded as joint unless there are express words indicating a several liability, 92.
- judgment against one joint obligor bars action against the other, 92.
- at common law, estate of a deceased joint obligor is not liable, 92.
- Code provisions abrogating the common law as to the release of the estate of a deceased co-guarantor, 93n.
- guarantor liable for interest upon the debt from the time of the default of the principal, 93.
- if debt is due upon demand, and no demand is made, the bringing of an action against the guarantor fixes date for computation of interest, 93.

Construction of the contract, 56.

- the natural and accepted meaning of words, a fair basis of interpretation, 57.
- giving to the contract the same construction as the parties themselves, 57.
- use of words in a special or restricted sense, 58.
- distinction between the use of parol evidence to establish the meaning of words, and to add new conditions, 58.
- equivocal or ambiguous words, 59.
- reasonable construction of ambiguous words by the obligee will prevail against intention of promisor, 59.

General guaranty, 63.

- may be enforced by any one who acts upon it, 63.
- may be assigned, 63.
- of negotiable paper, held not equivalent to an indorsement, 63.
- transfer of negotiable paper carries with it the guaranty without special assignment of the guaranty, 63.

(The references are to pages.)

Commercial Guaranties—Continued—

Special guaranty, 64.

- can only be enforced by the one to whom it is addressed, 64.
- not assignable until a right of action arises thereon, 64.
- can not be shown to have been addressed by mistake to the wrong person, 64.
- addressed to two persons can not be acted upon by one, 64.

Continuing guaranties, 70.

- defined, 70.
- conflicting views as to whether a guaranty without express limitations is continuing or temporary, 60n, 70.
- guaranty for a definite amount covers any balance within this limit, 72.

Absolute guaranties, 73.

- defined, 73.
- distinguished from guaranty of collectibility, 6n.
- creditor not obliged to make demand of debtor and give notice of default, 73.
- not necessary to pursue and exhaust the principal before proceeding against guarantor, 73.
- notice of acceptance of, not required, 83.

Collectibility, guaranty of, 74.

- distinguished from guaranty of payment, 74.
- conditional upon the exercise of diligence in trying to collect from the principal, 74.
- conflicting views as to whether execution and return of *nulla bona* is necessary in establishing non-collectibility, 75.
- burden is on the creditor to show non-collectibility in action upon the undertaking, 77.

Consideration, 67.

- will not be binding without a consideration, 67.
- may be supported by the same consideration as the principal contract, 67.
- past consideration not sufficient, 67.
- not necessary that the guarantor should derive any benefit from transaction, 68.
- agreement to forbear suit sufficient consideration, 68.
- actual forbearance, without agreement, held sufficient in England, 68.

Notice of acceptance of guaranty, 77.

- as affected by the fact that the amount of the debt and time of payment are indefinite, 78.
- not necessary to the inception of the contract of guaranty, 80.
- Federal court rule, 80.
- rule of the State courts, 83.
- not required if guaranty is absolute, 83.

Notice of default of principal, 85.

- where performance is at a definite time, not required, 85.
- stipulated for in the contract, 89.
- required, where the facts upon which guarantor's liability rest are not within his knowledge, 90.
- required, where letter of credit is for future advances, 91.
- guarantor discharged by lack of notice only to the extent of his damage, 91.

Revocation of guaranty, 94.

- executory contract of guaranty may be revoked at any time before it is acted upon, 94.
- if consideration wholly past, can not be revoked, 94.
- revocation does not become instantly operative, 94.

(The references are to pages.)

Commercial Guaranties—Continued—

death of guarantor operates as revocation in all cases where the guarantor if living might have revoked by notice, 95.
knowledge of death must be brought home to creditor in order that it shall operate as a revocation, 95.

Compensation—

change in compensation of principal not a material alteration of principal contract such as will discharge surety, 214, 255.
as affecting the contract of the corporate surety, 401, 410.

Concealment—

withholding information as to misconduct of principal, although not specifically inquired about considered fraudulent, 14, 152, 201.
rule not applicable to public officers, 258.
not necessary to show the concealment to be willful—concealment without intent to deceive is fraudulent, 152.
unauthorized statements of agents not binding upon creditor, 155.
creditor not bound to disclose misconduct of principal growing out of other transactions, in the absence of specific inquiries, 154, 158.
duty of creditor to disclose facts coming to his knowledge after execution of the contract, 156.

Condition—

promisor not discharged by breach of conditions agreed upon by the principal but not communicated to the creditor, 103n.
promisor discharged if restrictive conditions as to advancements by the creditor are not complied with, 109.
if contract made upon condition that the principal give the creditor additional security, and such security is released, promisor discharged, 139.
liability of surety who signs upon condition that another signs as co-surety, where the name of the latter is forged, 158, 202.
promisor estopped from setting up a non-compliance with conditions not communicated to creditor, 159.
doctrine of special agency as applied to delivery of suretyship contracts without complying with conditions, 160.
constructive notice to creditor of condition, 160.
promisor discharged if contract contains conditions not complied with, 25a, 163.
distinction between conditions precedent and subsequent as to use of parol proof in showing the condition, 163.
conditions imposed by law need not be stipulated, 165.
essential to the validity of a bond that the instruments recite the condition upon which the obligation is to become void, 190.
delivery of bond to obligee must be without condition, 194.
upon which appeal or stay bonds became payable, 322.
of bonds in replevin, 368.
of bail bonds, 392.
imposing limitations upon the liability of corporate surety, 416.
evasive or impossible conditions will not be enforced, 417.
discharging surety of claim is not made within a designated time, 420.

Consideration—

essential to suretyship contract, 2, 15, 67.
consideration of the principal contract will support suretyship, 15, 67, 198.
need not move directly to the promisor, 16, 68.

(The references are to pages.)

Consideration—Continued—

- extension of time to the principal is sufficient consideration, 16, 68.
- need not be adequate or compensatory, 16.
- detriment to the creditor a sufficient consideration, 16, 69.
- past transaction will not support a suretyship, 16, 199.
- view that the statute of frauds requires the consideration to be expressed in the writing, 30.
- view that the consideration need not be expressed in writing, 31, 166, 199.
- liability of promisor in suretyship not established by mere proof of consideration, but rests upon proof of the promise, 46.
- agreement to forbear suit a sufficient consideration, 68.
- in England actual forbearance to sue will support a suretyship, although the creditor makes no agreement to forbear, 68.
- agreement to extend time to the principal, not binding unless based upon a consideration, 115.
- part payment of debt already due, not a consideration for extension as to balance, 116.
- payment of legal rate of interest in advance is an adequate consideration for extension, 117.
- conflicting views as to whether a promise to pay legal rate of interest is a consideration for an extension of time, 117, 118.
- payment of usurious interest in advance as a consideration for an extension, 117n, 118.
- promise to pay a higher rate of interest than the legal rate and not tainted with usury is a good consideration for extension, 118.
- the execution of a note for usurious interest, a good consideration for an extension, 118n.
- giving collateral security to creditor, a good consideration for an extension of time, 121.
- a promise to pay amounting to waiver of defense, binding without new consideration, 130.
- failure of consideration of principal contract as a defense to the promisor, 148.
- failure of consideration may be shown by parol, 166.
- a seal imports a consideration, 193, 199.
- the burden of proving failure or lack of consideration is on the one who makes the claim, 199.
- consideration of a bond, presumed until the contrary is shown, 199.
- discretionary order of court good consideration, 200.
- bond executed pursuant to requirement of statute imports a consideration, 200.
- bond given upon the condition that the obligee will compound a felony, void for illegal consideration, 223.
- the emoluments of public office, sufficient consideration to support official bond, 243.
- appeal bond given without requirement of law, void for want of consideration, 318.
- if judgment appealed from is a nullity, the bond will be wanting in consideration, 318.
- injunction bond executed after injunction has issued, lacks consideration, 343.
- an illegal consideration to a surety will deprive him of his implied equity of indemnity against the principal, 505.
- failure of consideration of the main contract, as a defense against the promisor's right of indemnity, 515.

Constable (See Sheriff)—

(The references are to pages.)

Construction—

- strict construction of suretyship contracts by the earlier cases, 3.
- ambiguous words construed so as to prevent forfeiture, if possible, 19.
- view that suretyship contract should be construed most strongly against the promisor, 19, 59.
- view that a suretyship contract is to be construed most strongly in favor of the promisor, 20, 59.
- commercial guaranties, how construed, 56, 57.
- parol evidence in aid of construction, 202.
- when terms of bond are doubtful proof of construction given by the parties themselves is admissible, 203.
- of bonds to procure injunction, 343.
- corporate suretyship contracts construed, 100n, 413.
- as affected by the fact that the contract is drawn by the agent of the surety, 409.

Continuance—

- surety not discharged by continuance of legal action, 127.
- continuance of criminal proceeding by agreement between the State and defendant, releases surety upon bail bond, 128.

Continuing Guaranty—

- defined, 70.
- conflicting views as whether guaranty without express limitation is continuing or limited, 70.
- parol proof held admissible to determine whether guaranty is continuing or limited, 72n.

Contract of Indemnity—

- defined, 37.
- not within the statute of frauds, 37.
- the doctrine of *Thomas vs. Cook* as to a verbal promise of indemnity against a liability as surety, 38.
- American decisions as to whether a contract of indemnity is within the statute of frauds, 40.
- no distinction in principle between a promise to indemnify another as sole surety and those cases in which the indemnitor is also a co-surety, neither case is within the statute of frauds, 40.

Contract of Suretyship—

- parties, 1, 4.
- nature of the contract, 2.
- does not arise by implication, 2, 17.
- agreement to become surety not a contract of suretyship, 25a.
- must be for a consideration, 2, 15.
- not binding unless between parties competent to contract, 2, 12.
- must be in writing, 2.
- must be entered into without fraud or duress, 2, 12.
- must always be express, 17.
- strict construction of the earlier cases, 3.
- will not be enlarged to cover implications growing out of the language employed, 17.
- ambiguities construed as in other contracts, 18.
- promisor not estopped from denying the validity of contract, 20.
- incompleted contract not binding, 21.
- all suretyship contracts within the statute of frauds, 41.
- conditional contract of suretyship, 25a, 163.
- surety performing a verbal contract of suretyship, entitled to recover indemnity from the principal, 542.

(The references are to pages.)

Contribution—

- basis of the doctrine, 473.
- several sureties bound by separate instruments with limited liability but for same transaction—not co-sureties and not entitled to contribution, 453n, 478.
- courts of law assumed jurisdiction of the equitable doctrine of contribution, 476.
- practical distinction between action upon implied contract and equitable action, 477, 500.
- arises although promisors are bound by different instruments, 477.
- if liability of several promisors is in different amounts, contribution will be in proportion, 478.
- conditions of suretyship affecting contribution may be shown by parol, 481, 502.
- as affected by special contract between sureties, 481.
- between persons in the situation of a surety, 482.
- stockholders paying assessments for corporate debts, entitled to contribution from other stockholders, 482.
- one becoming surety at the request of another surety, entitled to contribution, 483.
- not available to one who aids in the commission of the default, 485.
- does not arise until co-surety pays more than his ratable share, 486.
- if co-surety paying less than his moiety thereby extinguishes the entire debt, he may have contribution, 487.
- surety for a surety not liable in contribution, 480.
- right of, fixed by payment, 487.
- acceptance of note of surety as payment gives right of recovery in contribution, 487.
- may be enforced without regard to financial condition of principal, 487.
- equitable contribution, 489.
- if co-surety is deceased, contribution may be had from his legal representatives, 491.
- if estate is distributed, contribution can be had from the beneficiaries, 491.
- may be enforced although surety pays without compulsion, 495.
- payment by surety of claim barred by statute of limitations deprives him of contribution, 496.
- surety paying note void on account of usury, can not recover contribution, 496.
- payment to prevent default, bars recovery in contribution, 496.
- payment before maturity at request of co-surety gives right of contribution, 497.
- judgment against surety is *prima facie* evidence against co-surety in action for contribution, 498.
- as affected by the release of one of several co-sureties, 498.
- not affected by failure of creditor to recover against one co-surety, 498.
- release of co-surety as to the creditor by operation of law, does not bar the right of contribution against him, 499.
- as affected by bankruptcy of a co-surety, 499.
- as to whether contingent liability in contribution is provable in bankruptcy, 500.
- between parties to bills and notes, 501.
- Successive sureties*, 478.
- relation of co-sureties does not exist, 479.
- successive accommodation indorsers not liable to contribute in absence of special agreement, 480, 501.

(The references are to pages.)

Contribution—Continued—

Amount recoverable, 489.

costs of litigation may be recovered, 489.

attorney fees incurred in defense of claim, 489.

interest on the amount paid may be recovered, 489.

only the amount actually paid can be recovered, 489.

as affected by the insolvency of one or more co-sureties, 490.

as affected by the absence from the jurisdiction or death of co-surety, 490.

Indemnity furnished by principal, 491.

held in trust for equal benefit of all co-sureties, 491.

indemnity not for benefit of all sureties, if sureties are bound by separate instruments with limited liability, 453n, 478.

co-surety paying may recover back proportionate share of indemnity, 492.

co-surety when sued in contribution may set off *pro rata* share of indemnity in the hands of plaintiff, 493.

surety may have contribution without waiting to realize upon his collateral, 494.

if surety holds indemnity covering both the liability in suretyship and debt owing him by principal, the equity of co-surety in the indemnity is superior, 495.

Conventional Subrogation—

defined, 470.

arises at such time and for such amount as the parties stipulate, 470.

Corporate Suretyship—

authorized by the statutes of the several states, 12d.

accepted as sole surety where two or more sureties are required, 12d.

courts take judicial notice of statutes relating to surety companies, 12d.

rights of parties the same whether the surety is private or incorporated, 401, 404.

contractual relation the same whether the suretyship is for compensation or for accommodation, 401, 409.

statutory regulations, 402n.

compared with private suretyship, 401, 408.

compared with insurance, 401, 409.

as affected by the premium or compensation paid, 401, 410.

cannot evade liability to the creditor because the principal fails to pay the premium, 411.

is within the Statute of Frauds, 412.

construction of the contract, 404, 413.

strict construction against corporate surety, 405, 413.

as affected by the fact that the contract is drawn by the agents and officers of the Surety Co., 414, 415n.

where the contract is not drawn by the surety but is prescribed by the law, 416.

as affected by special stipulations inserted in the contract for the protection of the Surety Co., 416.

stipulation that obligee shall notify the surety of act of principal that "may" involve loss on the bond, 417.

stipulations discharging surety if claim is not made within a designated time, 420.

cannot by contract enlarge the common law right of indemnity, 421.

stipulation that amount paid by surety shall be conclusive against the principal not binding, 421.

(The references are to pages.)

Corporate Suretyship—Continued—

- compensation received by corporate surety not sufficient of itself to make the obligation binding, 422.
- binding only when the undertaking is collateral to the obligation of another, 423.
- joint control of trust funds, 424.

Corporation—

- may bind itself in suretyship if done in the regular course of its business, 12a.
- officer of corporation cannot bind the corporation in a suretyship engagement unless in pursuance of a direct authority, 12b.
- national banking corporation cannot contract generally in suretyship, 12c.
- national bank may enter into such engagement in suretyship as is necessary to transfer commercial paper by indorsement, 12c.
- cannot become surety upon official bonds, 246.

Costs—

- bond for costs will survive the death of the surety, 185.
- when appeal bond does not cover costs in appellate court, 349.
- surety may recover costs in contribution, 489.
- surety may recover costs of litigation from principal, 512.

Co-Sureties—

- extension of time to a surety discharges a co-surety to the extent of the contributory share of the surety whose contract is extended, 122, 172.
- liability of surety when name of co-surety is forged, 158.
- discharge of co-surety releases remaining surety, 170.
- surety who pays, subrogated to creditors' right against co-surety, 439, 443.
- surviving surety paying debt may have dividends on the entire claim against estate of deceased co-surety, 451.
- subrogation between co-sureties, 453, 454.
- several sureties bound by separate instruments—with limited liability, but for same transaction—not co-sureties, 453n, 478.
- contribution between co-sureties, 454.
- when sureties upon successive undertakings are not co-sureties, 479.
- contribution as affected by the insolvency of one or more co-sureties, 490.
- death of co-surety, effect upon right of contribution, 490.
- surety who has paid may recover back from indemnified co-surety a proportionate share of the indemnity, 492.
- where co-surety holds the same indemnity for his suretyship and for his own debt, 495.
- judgment against surety, *prima facie* evidence against co-surety in action for contribution, 498.

Coverture (See Married Women)—

Credit—

- promise to pay for advancements made to another is not within the Statute of Frauds if credit is given wholly to the promisor, 42.
- charges made by a vendor in his books against the principal will estop him from claiming a sale on the credit of the promisor, 42.

(The references are to pages.)

Creditor—

- the obligee in suretyship is called creditor, 4.
- owes a duty of good faith toward the promisor, 13, 142.
- under no obligation to promisor to acquire lien upon property of principal, 138.
- if security or liens held by creditor are released, the promisor is discharged *pro tanto*, 137.
- negligence or misconduct of creditor resulting in loss of securities will discharge promisor, 140.
- failure of creditor to sue principal when requested, not a defense, 173.
- statutory provisions as to suit by creditor on request of promisor, 175.
- may exercise his option as to application of securities delivered without stipulation, 182.
- not required to resort to collateral in his hands before proceeding against the promisor, 183.
- may have dividends from estate of insolvent principal upon full amount of claim without first accounting for collateral, 452.
- right of subrogation to securities held by surety, 459.
- right of subrogation to liens held by surety, attaches as of the date of the liens, 460.
- right of subrogation to securities held by surety, superior to right of surety to apply collateral to other debts, 460.
- indemnity furnished surety by a stranger does not create a trust in favor of creditor, 461.
- distinction by some courts between security held for indemnity and security held for payment, 462.
- view of the English courts as to creditors' right of subrogation, 463.
- right of subrogation, as affected by the bankruptcy of both principal and surety, 464.

Creditors' Bill—

- right of judgment creditor to subject assets by creditors' bill, transferred by subrogation to surety who pays, 438.

Cumulative Bonds—

- second bond given in same term of public officer, cumulative, 263, 454.
- successive appeal bonds, cumulative, 334.
- successive administration bonds; cumulative, 380.

D**Date—**

- changing the date of maturity of the principal contract is a material alteration, 101.
- bond reciting a liability from its date will be held for defaults occurring before delivery of bond, 195, 204.
- illustrative cases as to the date when liability upon bond commences, 205.
- not material that appeal bond recites wrong date of the judgment, 319.

Death—

- at common law the death of a joint obligor releases his estate from liability, 92, 185.
- the equitable liability between joint promisors to contribute to each other is not released by the death of the co-obligor, 92n.

(The references are to pages.)

Death—Continued

- when death of guarantor operates as a revocation of the contract, 95, 184.
- death of promisor does not revoke executed contract, 184.
- dissolution of injunction because of the death of the defendant, creates no cause of action on the bond, 341.
- of principal, as an exoneration of bail, 398.
- of co-surety, effect upon the right of contribution, 490.

Debt—

- essential to the validity of a bond that the instrument recite that there is a debt to be secured, 190.

Defalcation—

- where public officer in default holds office successive terms, presumption that defalcation occurs in last term, 299.

Default—

- surety not entitled to notice of default, 6.
- when guarantor is entitled to notice of the default of principal, 6, 86, 89.
- notice of default required to charge the guarantor of a letter of credit, 91.
- no liability upon bond for default arising before delivery unless expressly stipulated, 194.
- surety who aids in the commission of default, not entitled to contribution, 485.

Defeasance—

- undertaking without defeasance clause, not valid, 318.

Defenses (See Suretyship Defenses)—

Del Credere Agent—

- contract of, not within the Statute of Frauds, and need not be in writing, 51.

Delay—

- promisor not released by delay of creditor in pursuing remedies against the principal, 131, 141, 173.

Delivery—

- misconduct of principal in delivery of suretyship obligations without complying with conditions imposed by promisor, 159, 200, 204.
- non-compliance with conditions as to delivery may be shown by parol, 164, 204.
- presumption as to contract made by irregular indorser signing after delivery, 11.
- proof of delivery of a bond to a particular person, not sufficient to validate a bond in which the name of obligee is not recited, 190.
- delivery of a bond is essential to its validity, 194.
- delivery of bond must be without condition, 194.
- possession of bond by obligee, *prima facie* evidence of delivery, 194.
- where bond of public officer covers the term of office, sureties held for defaults of the entire term without regard to time of delivery, 252.
- no liability upon bond for default before delivery unless expressly stipulated, 194.
- vacation of public office by failure to deliver bond within the time required by law, 249.

(The references are to pages.)

Deposit—

- surety not discharged by failure of bank to apply deposits of principal in payment of note due the bank, 145.
- if note to a bank is payable at the bank the surety is discharged by failure to apply funds of principal on deposit to the payment of note, 146.
- bank has no lien upon deposit as security for loan made depositor, 465.

Deputy—

- acts of deputies are official, 244.
- distinguished from an assistant or employee, 244.
- judicial officers cannot act through deputy, 245.
- agreements by principal to appoint deputies, void as against public policy, 245.

Diligence of the Creditor—

- guarantor may require, in some cases, 6, 74.
- test of due diligence, 75.
- conflicting views as to whether execution and return of *nulla bona* is necessary in establishing the non-collectibility as against the principal, 75, 76.
- creditor owes no duty of diligence in pursuing his remedies against the principal, 131, 141.
- creditor not required to exercise diligence in watching the affairs of the principal, 157.

Disability—

- persons under, can not become promisors in suretyship, 12, 246.
- created by statute, will not invalidate contract if prohibited persons sign as promisors, 12c.
- if substituted contract void by reason of disability of parties, creditor will be restored to rights under original contract, 137.
- if principal is incapacitated by reason of coverture, such defense is not available to the promisors, 12c, 149, 515.
- if principal is insane at the time of the execution of the main contract, such defense is not available to the promisor, 12c, 149.
- if principal incapacitated by insanity after execution of contract and before default, held a defense to the promisor, 149.
- the defense of infancy can only be set up by the infant, 149.
- want of capacity to prosecute appeal constitutes breach of bond, 327.
- where principal is incapacitated from making the main contract and promisor pays, the latter cannot enforce indemnity, 515.

Discharge of Promisor—

- duress of the principal will discharge the promisor except where he signs with knowledge of the duress, 13, 148.
- unauthorized filling up of blanks in an incompleated contract, 21.
- discharge of guarantor *pro tanto* by failure to give notice of default or acceptance in certain cases, 91.
- failure to comply with restrictive conditions as to amount of advancements, 109.
- acts of the creditor which make performance impossible, 148.
- agreement by creditor not to sue principal will discharge promisor, 130.
- taking additional security by the creditor will not release promisor, 135.
- payment or acts equivalent to payment as a discharge, 133, 226.
- refusal to accept tender of payment, will discharge promisor, 135.
- release of co-promisor by the creditor discharges surety or guarantor in part, 170, 498.

(The references are to pages.)

Discharge of Promisor—Continued—

release of co-promisor by operation of law, not a defense, 171, 499.
acceptance by distributee, of individual note of administrator or guardian, discharges promisor, even though note is not paid, 384, 389.

assignment by creditor of judgment lien, resulting in merger discharges promisor, 144.

failure of consideration of principal contract, as a defense, 148.

incapacity of principal by insanity, after execution of contract, but before default, as a defense, 149.

secret stipulations between creditor and principal affecting main contract, as a defense, 150.

if benefit to principal is less than represented, promisor not held, 151.

promisor not bound if contract contains conditions not complied with, 163.

breach of conditions imposed by law, as a defense, 165.

when failure by creditor to sue principal upon request of promisor will discharge promisor, 175.

promisor discharged if creditor fails to apply collateral at directed by principal, 182.

Alterations of the principal contract, 98, 211.

constitutes a defense, even though such alterations are beneficial to promisee, 100n, 110, 211.

grounds upon which defense of alteration rests, 99, 212.

change in the place of payment, 101.

change in the date of maturity of principal contract, 101.

change or mutilation by strangers, 104, 215.

promisor discharged whether such alterations are made before or after delivery of contract, 102.

the addition of new party as a principal maker, 105.

the addition of a new party as surety or guarantor, 106, 253.

change in the duties of the principal, 106, 212.

subsequent legislation, as affecting liability of surety upon bond of public officers, 107a, 253.

variation in the amount of advancements by the creditor, 107e, 108, 109.

defense of alteration, as affected by the absense of fraudulent intent, 104.

immaterial alterations, though fraudulent, disregarded, 105.

the substitution of new parties in the main contract, 109.

enlargement of the business of the employer increasing the risk, 113, 212.

sureties upon bonds of public officers discharged by alterations in the bond, 252.

Extension of time to the principal, 114.

is a substitution of a new contract, 114.

must be for a consideration, 115.

exception and delivery of a new note payable at a later date extends the original contract, 119.

promisor not released if new note is taken on condition that promisor is to be held, 120.

legislative action, extending time of settlement of public officers, 121.

co-surety discharged by extension to surety, 122.

persons in the situation of a surety, discharged by extension, 124, surety upon bail bond, as affected by continuance of case, 128.

extension of time as a defense under negotiable instrument codes, 128.

(The references are to pages.)

Discharge of Promisor—Continued—

Fraud as a defense to promisor.

- practiced by the creditor upon the principal, 15, 148.
- practiced against the promisor by the creditor or by the principal with knowledge of the creditor, 12.
- withholding information from promisor known to the creditor, materially affecting the risk, 14, 152.
- prior default of principal, not known to the creditor, but which might have been discovered by exercise of diligence, 14.
- failure to disclose facts which materially affect the risk, coming to the knowledge of the creditor after the execution of the contract, 156.

Release of securities held by creditor, 137, 501.

- creditor in position of trustee as to all property or interest in property in his possession belonging to the principal, 138.
- promisor discharged by release, whether the custody or lien of creditor is acquired at the time of suretyship contract or afterwards, 138.
- promisor wholly discharged by release, if contract was made upon condition that principal give creditor additional security, 139.
- loss of securities resulting from negligence, 140.
- failure to file mortgage for record, 141, 465.
- failure to foreclose mortgage, 141.
- loss of securities by operation of law, 143.

Release of principal by creditor, 146.

- reserving rights against promisor, not a defense, 146.
- if promisor fully indemnified, not discharged by release of principal, 147.
- release of principal by operation of law, 147.
- where release of principal by operation of law is not the result of the fault of creditor, 149.

Negotiable instruments.

- failure of holder to make demand upon maker until remedy against maker is barred, effect upon liability of intermediate indorser, 144.
- release of prior indorser by holder, discharges all intermediate indorsers, 144.
- failure of bank to apply deposits of principal in payment, where note is payable at the bank, discharges surety, 146.

Disclosure—

- failure to disclose facts known to creditor, materially affecting the risk as a defense to promisor, 152.
- failure by creditor to disclose material facts even without intent to deceive will discharge promisor, 152.
- creditor cannot evade duty of disclosure by showing contract was solicited by principal, 154.
- creditor not bound to disclose misconduct of principal growing out of other transactions, in the absence of specific inquiries, 154.
- duty of creditor to disclose facts coming to his knowledge after execution of the contract, 156.
- creditor not bound to disclose facts which promisor with diligence might have ascertained, 15n.
- creditor not bound to disclose to promisor his knowledge of the insolvency of principal, 157.
- failure by corporation to disclose that employee does not comply with by-laws will not discharge surety of employee, 157.

(The references are to pages.)

Dismissal—

- appeal may be dismissed for non-compliance with statute as to approval of bond, 314.
- appeal subject to dismissal if sureties fail to justify, 315.
- giving bond for smaller sum than required by statute, ground for dismissal of action, 315.
- approval of prohibited parties as sureties, ground of dismissal, 317.
- distinction between informalities in judicial bonds giving right of dismissal of action and those which invalidate the bond, 317.
- for want of jurisdiction, not a breach of appeal bond, 321, 324.
- for want of prosecution, a constructive affirmance of the lower court, 324, 340.
- of appeal, and subsequent reinstatement by consent of parties, 327.
- of injunction proceeding without prejudice for want of service, not a breach of bond, 339.
- voluntary dismissal of injunction by plaintiff, equivalent to disallowance by court, 340.
- of attachment, a breach of the bond, 359.
- of attachment by reason of defective affidavit, a breach of the bond, 360.
- of replevin, renders the bond liable, 369.

Dissolution of Attachment—

- by execution of bond, 356.
- if attachment is void, bond to dissolve will be void, 356.
- bond to dissolve, releases sureties upon bond to procure attachment, 357n.
- for causes other than the merits, 360.

Dividends—

- surety paying entitled to *pro rata* share of dividend derived from assets of principal, 450.
- surety entitled to dividend on entire claim against estate of deceased co-surety, 451.
- creditor may have dividends upon full amount of claim, without deducting collateral, 452.

Duress—

- surety contract must not be induced by duress, 2, 12d.
- promisor not bound, if principal entered into the contract under duress, 12d, 148.

Duties—

- change in the duties of the principal as a defense to the promisor, 106.
- surety upon bond of public officer discharged by subsequent legislation changing the duties of the office, 107, 254.
- duties of public officers distinguished from private obligations, 189.
- for which executors and administrators are chargeable on their bonds, 375.

E**Ejectment—**

- appeal from order of, binds sureties for rents and profits pending appeal, 332.
- surety upon bond to secure purchase price of land, may maintain ejectment in the right of the vendor, 437.

Elegit—

- the "Estate by Elegit," a lien created by law, 4n.

(The references are to pages.)

Equity—

- will reform contract induced by fraud, 18.
- will reform contract which has been altered by accident or mistake, 104, 202.
- promisor may maintain bill in equity to compel creditor to sue principal, 176.
- equitable exoneration of sureties before payment, 488, 508.

Error Proceedings (See Appeal and Stay Bonds)—

Escape—

- when bail liable if accused appears and afterwards escapes, 400.

Estate—

- surety not discharged by failure of creditor to present claim against estate of principal, 132.

Estoppel—

- persons prohibited by statute from becoming promisors in suretyship are estopped from evading liability on the ground of such prohibition, 12c.
- promisor estopped from denying the recitals of the contract, 20, 215, 321, 336, 392.
- not estopped from denying the validity of the contract, 20.
- not estopped from asserting the illegality of the main contract, 20.
- promisor upon judicial bonds stopped from denying the jurisdiction of the court, 20, 336, 344.
- charges made by a vendor in his books against a person to whom he delivers property will estop him from claiming a sale on the credit of a third person, 42.
- promisor estopped from showing conditions agreed to by principal but not communicated to creditor, 103n, 160.
- waiver of defense of "giving time" may be shown by estoppel, 131.
- creditor estopped from enforcing contract which he has declared to be at an end, 168.
- surety upon a bond estopped from denying the due execution of the contract between principal and obligee, 216.
- if undertaking is signed by a corporate name the obligor is estopped from denying corporate capacity, 256.
- sureties upon appeal bonds, estopped from all collateral attack upon judgment appealed from, 335, 336.
- sureties not estopped from showing fraud and collusion in obtaining the judgment appealed from, 336.
- sureties upon attachment bonds, estopped from questioning the regularity of the proceedings, 362.
- if bail bond recites all necessary jurisdictional facts, sureties estopped from asserting lack of authority in officer to take bail, 392.

Evidence—

- possession and retention of bond by obligee *prima facie* evidence of delivery and acceptance, 194.
- evidence against sureties upon bonds, 298.
- admissions of principal, not competent against sureties to establish default, 299.
- contemporaneous declarations admissible as part of the *res gestae*, 299.
- entries in books of principal, competent as admissions, 299.
- if principal and surety are sued jointly, admissions of principal are competent, 300.

(The references are to pages.)

Evidence—Continued—

- view that judgment against a public officer is not admissible against his surety, 300.
- record of amercement against public officer held admissible against his surety, 302.
- view that judgment against the principal is *prima facie* evidence against the surety, 302.
- view that judgment against the principal is conclusive against surety, 303.
- judgment in favor of principal, conclusive in favor of surety, 304.
- judgment in Appellate Court against principal conclusive against surety on appeal bond, 329.

Execution—

- conflicting views as to whether execution and return of *nulla bona* is necessary in establishing the non-collectibility as against the principal, 75, 76.
- release of levy of execution upon property of principal will discharge promisor, 138, 144.
- return of execution without levy by the direction of the creditor, will not discharge promisor, 142u.
- statutory provisions as to issuing execution against the principal before proceeding against property of the creditor, 183.
- default of sheriff in not paying over money collected in his second term upon execution levied in first term, a liability upon the first term sureties, 263.
- as affecting right of action upon appeal bond, 307.
- purchaser of land incumbered with judgment lien, by paying judgment, entitled to execution against other lands of judgment debtor, 428.
- costs of execution against promisor can not be recovered in action for indemnity against principal, 513.

Execution of the Contract, 25a. (See Signature).

Executors and Administrators—

- bond to administrator in representative capacity may be sued upon in his individual or official capacity, 232.
- if obligee is deceased, his administrator may sue on bond, 232.
- judicial officers distinguished from public officers, 375.
- clothed with no discretion, and must perform the orders of court, 376.
- successive administration bonds are cumulative, 380.
- sureties upon special bond in land sale proceeding, not liable for defaults on general bond, 381.
- bond given in ancillary administration not cumulative with bond given in principal administration, 381.
- when judgment or order of court is necessary to cause of action on bond, 381.
- if judgment has been entered against administrator, not necessary to have execution before instituting action, 382.
- sureties are concluded by judgment against the principal, 383.
- judgment for the principal conclusive in favor of sureties, 383.
- judgment fixing amount of legacy conclusive against sureties, 383.
- sureties not estopped from showing judgment was obtained by fraud, 383.
- judgment against administrator by confession, only *prima facie* evidence against his sureties, 383.
- judgment against administrator resulting from acts done in excess of his authority only *prima facie* evidence against his sureties, 383.

(The references are to pages.)

Executors and Administrators—Continued—

who may maintain action on administration bonds, 425.
sureties of, may follow and subject trust funds in the hands of third parties, 437.

Duties for failure of which executors and administrators are liable, 375.
failure to administer estate in accordance with direction of the last will and testament, 375.

chargeable for negligence and bad judgment in investing funds of the estate, 376.

liable for failure to resist the allowance of unjust claims, 377.

refusal to pay allowed claims, 377.

failure to pay an heir his distributive share, 377.

failure to pay widow the amount allowed by court, 377.

failure to observe the proper order of preference in the distribution of assets, 377.

payment in unequal proportions of claims of the same class, 377.

neglect of administrator to file account, held constructive conversion, 377.

failure to file inventory considered breach of bond, 377.

Scope of administration bond, 378.

covers all assets whether coming into the hands of the officer before or after the execution of the bond, 378.

covers conversions before the execution of the bond, 378.

statements in report of officer charging himself with assets he never received, not conclusive against sureties, 378n.

liable for funds collected under color of office, but not properly assets of the estate, 379.

covers all defaults in reference to land of the decedent, although the officer has no authority touching the land, 379.

if administrator is debtor of the estate, he must account for the debt on his bond, 379.

collecting of rents in the right of heirs, creates no liability upon sureties, 380.

expenses of administration, not chargeable against the bond, 380.

failure to pay attorney fees in accordance with order of court, a breach of bond, 380.

Defenses to action upon bond, 384.

not a defense that the officer was advised by counsel to do the wrongful act, 376.

any order discharging administrator will release the bond, 384.

discharge of co-surety will release remaining surety, 384.

conversion of trust funds with knowledge and consent of the beneficiaries will bar action on bond, 384.

acceptance of individual note of administrator by distributee exonerates sureties, 384.

where administrator occupies a position of double trust, the law makes the transfer as soon as the payment becomes due and exonerates the administration sureties, 384.

if executor conforms to requirements of the will his acts will be valid, although the will is thereafter set aside, 385.

no defense to sureties that the appointment of administrator was irregular, 385.

Exoneration of Sureties—

may be shown by parol, 168.

attachment bond exonerated by delivering up the property seized, 363.

if discharge bond is executed, forthcoming bond is exonerated, 403.

(The references are to pages.)

Exoneration of Sureties—Continued—

- by amendments to attachment process or substitution of new party, 363.
- submission of case to arbitration, 363.
- upon bail bonds, 397.
- equitable exoneration before payment, 488, 508.

Extension of Time—

- is a sufficient consideration to support a suretyship contract, 7.
- agreement to extend time on main contract discharges promisor who does not consent, 114.
- promisor discharged by extension even though no damage to promisor, 115.
- agreement for extension, not binding unless based upon a consideration, 115.
- if agreement for extension is set aside by the court, surety not released, 116.
- extension by attorney holding claim for collection does not release surety, 116.
- acquiescence in default of principal, not an extension of time, 115.
- payment of legal rate of interest in advance, an adequate consideration for an extension, 117.
- conflicting views as to whether a *promise* to pay legal rate of interest is a consideration for an extension of time, 117, 118.
- payment of usurious interest in advance as a consideration for an extension, 117n, 118.
- promise to pay a higher rate of interest than the legal rate and not tainted with usury, a good consideration for extension, 118.
- the execution of a note for usurious interest, a good consideration for an extension, 118n.
- extension of time as a defense under the negotiable instrument code, 128.
- agreement for extension must be for a definite time, 119.
- execution and delivery of a new note payable at a later date extends the time of original obligation, 119.
- giving note for past due obligation, not an extension of original debt, 120.
- giving collateral securities maturing at a later date does not operate to extend the time on the debt, 120.
- giving collateral, a good consideration for an *agreement* to extend, 121.
- agreement for extension may be shown by parol, 121.
- promisor discharged by extension of time resulting from act of Legislature, 121, 256.
- giving time to surety, effect upon co-surety, 122, 172.
- persons in the situation of a surety, discharged by extension of time, 124.
- appeal of continuance of judicial proceedings not an "extension of time," 127.
- reserving rights against promisor, 128b.
- distinguished from agreement not to sue, 129.
- waiver of the defense of extension, 130.

F

Failure of Consideration—

- failure of consideration of the principal contract as a defense to the promisor, 148.
- failure of consideration may be shown by parol, 166.

(The references are to pages.)

Failure of Consideration—Continued—

burden of proving a failure of consideration is upon the one who makes the claim, 199.
of the main contract, as a defense to the promisor's right of indemnity, 515.

Favorite of the Law—

surety a favored debtor, 3n.
surety company not a favored debtor, 100n, 413.
importance of the doctrine overestimated, 413.

Forbearance to Sue—

is a sufficient consideration for a suretyship contract, 68.
in England actual forbearance to sue will support a guaranty, although the creditor makes no agreement to forbear, 68.
agreement to forbear as distinguished from agreement to extend time, 129.
sufficient consideration to support suretyship contract, 16.

Foreclosure—

law does not require substitution of a bond for the property in appeals in foreclosure proceedings, 330.
limited liability upon foreclosure appeal bonds in Federal court, 330.
no recovery upon appeal bond for deficiency where personal judgment is not rendered below, 331.
surety paying debt secured by mortgage, entitled to have foreclosure in his own name, 444.

Forfeiture—

courts will construe official bonds, if possible, to avoid forfeiture, 250.

Forgery—

if note given in renewal is forged, the old note, though surrendered, is revived, 136.
liability of surety where name of co-surety is forged, 158, 202.

Forthcoming Bond (See Attachment)—

Fraud (See Statute of Frauds)—

will avoid suretyship contract, 2, 13, 14, 148.
practiced by the creditor upon the principal will discharge the promisor, 13, 14, 148.
fraud of the creditor, or of the principal with knowledge of the creditor against the promisor will discharge the promisor, 13, 150, 200.
withholding information from the promisor known to the creditor, materially affecting the risk, held to amount to fraud, 14, 201.
concealment of previous misconduct of principal occupying position of trust is constructive fraud, 14, 201.
creditor not bound to disclose facts which promisor with diligence might have ascertained, 15n.
practiced by principal on the promisor without knowledge of the creditor, will not discharge the promisor, 15, 158.
promisor liable, although fraudulently induced to sign while intoxicated, 15n.
promisor not estopped from denying recitals of the contract inserted by fraud, 20.
if suretyship is induced by fraud, equity will reform the contract, 18.
secret stipulations between creditor and principal affecting character of main contract, a fraud upon the promisor, 150.

(The references are to pages.)

Fraud—Continued—

- concealment without intent to deceive is fraudulent, if facts concealed are material, 152.
- fraud will not be imputed because the creditor by reason of inattention to his own affairs does not know of facts materially affecting risk of promisor, 154, 157.
- fraud can not be predicated upon a promise, only present or past transactions the subject of misrepresentation, 162.
- conflicting views as to whether a fraudulent concealment by the principal of default prevents the operation of the statute of limitations as to the surety, 228.

Fraudulent Conveyance—

- surety paying, may maintain action to set aside conveyance in right of creditor, 438.
- right of surety to set aside conveyance dates from the execution of the suretyship contract, 438n, 507.
- surety may have equitable contribution enforced before payment where co-surety makes fraudulent conveyance of his property, 489.

Fraudulent Intent—

- alterations of suretyship contract as affected by absence of fraudulent intent, 104.
- promise to do an act without any intent of performance, not fraudulent, 162.

G

Gambling Debt—

- surety paying, can not charge the principal in action for indemnity, 515.

General Guaranty—

- may be enforced by any one to whom it is presented, who acts upon it, 63.
- a general guaranty is assignable, 63.

Giving Time (See Extension of Time)—

Grantor—

- of land subject to mortgage, in the situation of a surety, 448.

Guarantor—

- defined, 5.
- distinguished from surety, 5, 6n.
- entitled to notice, 6.
- irregular indorser presumed to be guarantor, 8n.
- irregular indorsement after delivery generally results in the contract of a guarantor, 9, 10.
- guarantor bound, although principal has no knowledge of the guaranty, 67.
- not necessary that the guarantor derive any benefit from the contract, 68.
- entitled to notice of default in certain cases, 6, 86, 89, 91.
- when notice of acceptance of guaranty necessary to charge the guarantor, 77.
- when a guarantor is entitled to notice of advancements made under the guaranty, 78.
- alterations of main contract reducing or enlarging amount to be advanced by the creditor will release guarantor, 108.

(The references are to pages.)

Guaranty (See Commercial Guaranties)—

- a subdivision of suretyship, 2.
- differs from the contract of the surety, 2, 5, 6n.
- guaranty of collectibility distinguished from a guaranty of payment, 6n, 74.
- guaranty of a note of a third party given in payment of a debt, not a suretyship contract and need not be in writing, 49.
- general guaranty may be enforced by any one to whom it is addressed, who acts upon it, 63.
- general guaranty held not equivalent to an indorsement, 63, 64.
- special guaranty, 64.
- retrospective guaranties, 66.
- continuing guaranties, 70.
- guaranty of collectibility, 74.
- notice of acceptance of guaranty—rule in the State and Federal courts compared, 77, 80, 83.
- notice to guarantor of default of principal, 86.
- revocation of guaranty, 94.
- death of guarantor as a revocation of guaranty, 95.

Guardian—

- stipulates by legal implication that he is capable of managing the affairs of his ward, 386.
- liable for all property of the ward coming to his possession whether derived from estate of ancestor or other sources, 387.
- liable on his bond for loans made upon insufficient security, 387.
- bond to guardian in representative capacity may be sued upon in his individual or official capacity, 232.

Scope of liability upon bond.

- sureties liable for money received before the execution of bond, 387.
- conversions before execution of bond considered liability against sureties, 387.
- special bond to secure land sale proceeds, not cumulative with general bond, 387.
- debts due the ward by guardian become assets for which the bond is liable, 388.
- money paid guardian after ward attains majority, not a charge on the bond, 388.
- conversions after majority, of money received during minority, a charge upon the bond, 388.
- failure to make settlement as soon as ward reaches majority, a breach of bond, 388.
- release by the ward, when the full amount has not been paid, presumed to be fraudulent, 388.
- settlement made upon misrepresentation may be repudiated and sureties held, 389.
- acceptance by ward of the note of guardian, a defense to the sureties, 389.
- sureties liable for amount receipted for, where guardian occupies position of double trust, 389.
- adjudication against guardian conclusive against sureties, 389.
- settlement procured by fraud not conclusive, 390.

H**Habeas Corpus—**

- duty of granting writ is ministerial, 292.

Holding Over—

- sureties of officer who holds over without bond, liable for conversions in second term, 261.

(The references are to pages.)

I

Ignorance of Law—

when facts are known, ignorance of legal effect is voluntary and not a defense, 130.

Illegal Acts—

as a consideration, will avoid contract, 16.

Illegal Contract—

promisor in suretyship not estopped from denying the legality of the main contract, 20.

undertakings for indemnity against illegal contracts are void, 224.

Implication—

obligations in suretyship can not be created by, 2, 17, 24.

holder of incomplete suretyship contract who receives it from the promisor is authorized by implication to fill up the instrument, 21, 102, 195.

implied agency does not reach the amount of the penalty and such blanks can not be filled except by express authority, 161.

holder of suretyship contract fully written, has no implied authority to make alterations, 102, 103.

acceptance of note by creditor payable at a later date, raise implied agreement to extend time to maturity of note, 119.

giving collateral maturing at a later date, does not imply a contract of extension, 120.

Implied Contract—

the equity of contribution between co-sureties not founded upon implied contract, 474.

practical distinction between actions upon implied contract and actions arising from equitable basis, 477, 500.

no contract of indemnity implied in favor of surety upon bail bond, 504.

of indemnity, applies only in favor of the one whose debt is paid, and not in favor of others receiving benefit from the payment, 505.

no promise of indemnity implied where promisor signs without request of principal, 506.

Imprisonment—

of principal in penitentiary for another offense while out on bail will not exonerate his sureties, 399.

Incompleted Contracts of Suretyship—

not binding upon the promisor unless completed by his authority, 21.

delivery by the promisor of an incompleted instrument authorizes the holder, by implication, to fill in all blanks, 21, 195.

if penalty is left blank it can not be supplied without express assent, 22, 161.

if promisor authorizes the principal to fill in such words as will express the understanding of the parties, the contract will be binding, even though when completed it enlarges the liability intended, 22, 161.

promisor who signs with knowledge that the contract is incomplete, will be bound, 150.

clerical omissions of words necessary to complete the sense, supplied by construction, 344.

Incorporation—

of obligees, held a discharge of the sureties upon bond, 113.

Increase of Salary—

will not release surety upon bond, 214, 255.

(The references are to pages.)

Indemnity—

giving time, not a defense to the surety if promisor is fully indemnified, 123.

surety who has indemnity, a trustee for his co-surety, 453, 491.

indemnity in the hands of surety inures to the benefit of co-sureties who make their contract at a later period, 492.

Bonds of general indemnity.

scope of indemnity undertaking, 206.

contract of indemnity defined, 37.

contract of indemnity not within the statute of frauds, 37.

bond to sheriff to prevent performance of duty does not bind surety, 225.

bond to public officer to indemnify against consequences of an unlawful act already committed, is valid, 226.

Promisor's right against principal, 503.

rests upon implied contract, 503.

no implied contract in favor of surety upon a bail bond, 504.

no indemnity implied if consideration for suretyship is illegal, 505.

indemnity not implied, except against the one whose debt is canceled, 505.

surety signing without request of principal has no implied right of indemnity, 506.

indemnity may be recovered, although surety pays upon a verbal promise of suretyship, 506.

when the right arises, 507.

not necessary for promisor to pay entire debt, indemnity may be enforced upon part payment, 507.

cause of action for indemnity can not arise before maturity of the debt, 508.

equitable exoneration of promisor before payment, 508.

acceptance by creditor of negotiable note of promisor amounts to payment and gives rise to action for indemnity, 509.

view that acceptance of non-negotiable obligation does not constitute cause of action for indemnity, 510.

amount recoverable by action for indemnity, 511.

costs of litigation recoverable, 512.

promisor can not recover more than the actual amount paid, 512.

costs of execution against promisor not recoverable, 513.

damages resulting indirectly from the suretyship, not subject of indemnity, 513.

as to whether promisor can recover indemnity where payment is made upon claims for which the principal is not liable, 513.

if promisor is liable to the creditor he may recover his indemnity from the principal, although creditor's right against principal is barred, 514.

if principal might have defended on account of failure of consideration, the promisor who voluntarily pays can not recover indemnity, 515.

where principal debt rests upon an illegal consideration, promisor can not recover indemnity, 515.

as affected by want of contractual capacity in the principal, 515.

as affected by the non-liability of surety or guarantor, 515.

accommodation indorser may waive notice and demand without impairing his right of indemnity, 516.

same rule as to statute of limitations, 516.

when judgment against promisor is conclusive against principal, 517.

as affected by the bankruptcy of the principal, 517.

liability for indemnity is a provable debt in bankruptcy, 518.

(The references are to pages.)

Indictment—

where bail bond describes one offense and indictment a different offense, the bail is invalidated, 396.
no defense to sureties upon bail bond that no indictment was rendered against accused, 396.

Indorser—

defined, 7.
irregular or anomalous indorser, 7.
irregular indorser who signs, not to give the maker credit with the payee, but to enable the maker or payee to discount the paper with a third party, held as regular indorser, 8, 9.
release of a prior indorser by holder, discharges all intermediate indorsers, 144.
if there are several intervening indorsers each one is a promisor in suretyship, 448.
blank indorsement, before delivery, of note payable to the order of the maker creates contract of regular indorser, 11.
surety who stays execution upon judgment upon promissory note, not subrogated by payment to rights of holder against indorser, 432.
if indorser pays he may be subrogated to right of holder upon bond to stay execution, 432.
subrogated to holder's right of execution, 448.
subrogated to rights of holder upon mortgage security, 448.
successive accommodation indorsers, not entitled to contribution, 486, 501.

Indorsee—

subrogated to securities held by indorser, 462.
takes securities by subrogation subject to all prior equities whether transfer before or after maturity, 463.

Infancy—

incapacitates party from making a binding contract in suretyship, 12a.
contract by infant is voidable, 12a.
contract by infant becomes valid only when ratified by him after becoming of age, 12a.
if substituted contract is void by reason of infancy of maker the creditor will be restored to all his rights under the original contract, 137.
the defense of infancy can only be set up by the infant, 149.
one advancing money to infant for the purchase of necessities, subrogated to the position of one who furnishes necessities to infant, 469n.

Initials—

if memorandum required by the statute of frauds is signed by the initials of the party to be charged it will be sufficient, 36.

Injunction—

generally inoperative without bond, 337.
court of equity will require bond when not provided for by statute, 338.
without bond, a party against whom an injunction wrongfully issues, can not recover damages, 339.

Actions upon injunction bonds, 339.

no action accrues upon injunction bond until determined by judgment of court that injunction was wrongful, 339.

(The references are to pages.)

Injunction—Continued—

dismissal of action without prejudice for want of service, not a breach of injunction bond, 339.

dismissal of action by court for want of prosecution constitutes a breach, 340.

voluntary dismissal by plaintiff a breach of the bond, 340.

dismissal by agreement of parties releases sureties, 340.

where dissolution of injunction is based upon facts arising after allowance of the writ, no liability on the bond, 340.

dissolution of injunction on account of death of the defendant, not a breach, 341.

restraining order not necessarily wrongful even though final injunction refused, 341n.

dissolution for insufficient bond constitutes a breach, 342.

submission to arbitration resulting in dissolution of injunction releases sureties upon the bond, 342.

dissolution as to part of the relief prayed for, not a breach, 343.

no action arises upon dissolution of a temporary restraining order until final determination of the cause, 343.

dissolution of injunction in appellate court renders the bond liable although made permanent in the lower court, 346.

disobedience of injunction no defense to the bond, 346.

Construction of injunction bonds, 343.

will be strictly construed, 343.

bond given after injunction has issued, without consideration, 343.
if penalty exceeds requirements of the statute, imperative as to the excess, 343.

parol evidence not competent to remedy defects in the form of the bond, 343.

sureties not estopped by recitals in the bond from showing that the injunction did not issue, 344.

references in injunction bonds to records, make such record a part of the bond, 344.

terms of the bond not enlarged by order of court dissolving the injunction, 343.

Defenses of sureties upon bond, 344.

sureties estopped from showing the court had no jurisdiction to issue the writ, 344.

where the writ is directed against the doing of an act which the defendant never intended to do, 345.

no defense that an injunction was sustained in another action involving the same issues, 345.

Measure of damages for breach of bond, 346.

damages limited to such a flow directly from the injunction, 346.

loss of profits from interruption of defendant's business, not recoverable, 346.

loss of profits of business which are ascertainable with reasonable certainty, recoverable, 347.

depreciation of property withdrawn from the market by the injunction may be recovered, 347.

where money is detained, interest is recoverable, 347.

loss of time and wages, 347.

credits barred by statute of limitations pending the injunction, proper subject of damages, 348.

mental strain and anxiety, not a subject of damages, 348.

value of the use and occupation of land as an element of damages, 348.

time of defendant in procuring dissolution of injunction, not an element of damage, 348.

(The references are to pages.)

Injunction—Continued—

- all necessary disbursements in procuring dissolution, including attorney fees, recoverable, 348.
- expenses incurred in an unsuccessful attempt to dissolve injunction not recoverable, even though on final hearing the injunction is dissolved, 348a, 348b.
- counsel fees not recoverable in the Federal court, 348a.
- attorney fees contracted for, but not paid, recoverable, 348b.
- if injunction is incident to some other relief and dissolved on final hearing, attorney fees not recoverable, 348b.
- attorney fees in modifying an order of injunction, not a liability upon the bond, 349.
- services of counsel in resisting an allowance of an injunction, not recoverable, 350.
- where no motion is made to dissolve injunction until final hearing no recovery for counsel fees, 349.
- services in appellate court recoverable, 350.

Insanity—

- insane person can not bind himself as a promisor in suretyship, 12a.
- if principal is insane at the time of the execution of the main contract, such defense is not available to the promisor, 149.
- if principal incapacitated by insanity after execution of contract and before default, held a defense to the promisor, 149.
- surety upon bail bond exonerated, if principal is adjudged a lunatic and confined in an asylum, 400.

Insolvency—

- in a guaranty of collectibility the burden is on the creditor to establish the insolvency of the principal, 77.
- creditor not bound to notify promisor of the insolvency of the principal, 156.
- if creditor is insolvent the right of equitable set off against the creditor in the right of the principal accrues to promisor, 180.
- of one or more co-sureties, effect as to right of contribution, 490.

Installments—

- surety paying debt by installments may maintain action for indemnity upon each payment, 507.

Insurance—

- compared with corporate suretyship, 409.

Insurance Interest—

- as known to insurance has no necessary relation to suretyship, 423.

Intention—

- alterations of suretyship contracts as affected by absence of fraudulent intent, 104.
- promise to do an act without intent of performance, not fraudulent, 162.

Interest—

- promisor in suretyship liable for interest upon the debt, 93.
- payment of legal rate of interest in advance, a consideration for extension of time, 117.
- view that a promise to pay legal rate of interest is a consideration for extension, 117.
- payment of usurious interest in advance as a consideration for extension of time, 117n, 118.
- the execution of a note for usurious interest in advance, an adequate consideration for an extension of time, 118n.

(The references are to pages.)

Interest—Continued—

- as an element in the measure of damage upon a bond, 222, 333, 366, 373.
- distinction between bond for performance and bond for payment, 222.
- public officer liable for interest collected upon public funds, 265.
- cases holding the officer not liable to account for interest on public funds, 268.
- not recoverable upon foreclosure appeal bond in Federal court, 330.
- surety entitled to recover interest from co-surety in contribution, 489.

Interpretation—

- ambiguous words so interpreted as to prevent forfeiture if possible, 19.
- view that a suretyship contract should be construed most strongly against the promisor, 19.
- view that a suretyship contract is to be construed most strongly in favor of the promisor, 19.
- words employed in suretyship should be given their generally accepted meaning where the interpretation of the parties themselves is not ascertained, 57.
- parol evidence is competent to show that the language employed was intended to have a special meaning, 58, 203.

Intoxication—

- promisor not released who signs while intoxicated, 15n.

Involuntary Suretyship—

- not an obligation imposed by implication, but merely the extension of the privileges of suretyship to parties already bound, 2n, 24, 25.
- creditor not bound except for acts done after notice of suretyship relation, 24.
- illustrative cases of suretyship by operation of law, 25.
- subrogation as applied to one in the situation of a surety, 447.
- contribution between persons in the situation of a surety, 482.

Irregular Indorser—

- defined, 7.
- irregular indorsement creates only liability of regular indorser in certain jurisdictions, 7, 10.
- irregular indorsement purports no contract in certain jurisdictions, 11n.
- held surety, guarantor, or indorser, depending on special contract made, 7.
- when liable only as second indorser, 9, 10.
- liability as regulated by statute, 10n.
- Presumption of liability incurred*, 7, 8n, 10.
 - presumed to be surety, 8n.
 - presumed to be guarantor, 8n.
- signing to enable the maker or payee to discount the paper with a third party, presumed to be liable as regular indorser, 8, 9.
- Signing before or after delivery, effect upon liability*, 9.
 - jurisdictions in which anomalous indorser signing before delivery held liable to payee, 11.

(The references are to pages.)

J

Joinder of Parties Plaintiff—

all persons for whose benefit a bond is made must be joined in an action for the breach of it, 233.

Joint Actions—

only joint actions could be brought at common law to enforce joint liability, 180.

Joint Control of Trust Funds, 424.

Joint Liability—

if promisor is jointly liable for the debt with the principal his contract to pay is not within the statute of frauds, 43.

one may be a joint obligor as to the creditor and an accommodation party as to the debtor, 43.

guaranty regarded as a joint obligation unless there are express words indicating a several liability, 92.

judgment against one joint obligor bars action against the other, 92.
the estate of a deceased joint guarantor not liable at common law, 92, 185.

statutes abrogating the common law as to non-liability of estate of deceased joint obligor, 187.

at common law only joint action could be brought to enforce a joint liability, 180.

subrogation between persons jointly liable, 449.

Joint Obligors—

if bond is joint and several, any one or more joint obligors may be made defendants in the same action, 234.

sureties upon successive bonds may be joined as defendants in one action, 234.

Judicial Acts—

approval of official bonds held a judicial act, 247.

the act of passing upon the fitness of a person appointed by the court to public service is judicial, 292.

granting of bail a judicial act, 391.

Judicial Bonds—

Application of suretyship to legal remedies, 308.

indemnity as a condition of legal action, an anomaly, 308.

necessity for judicial bonds, 309.

at common law a writ of error operated as *supersedeas*, 309.

acts of Parliament requiring security in certain cases, 309.

Federal judiciary act as to bonds in stay of execution, 310.

State statutes as to same, 310.

origin of injunction bonds, 311.

Statutory requirements as to appeal or stay bonds, 314.

limitation of time for filing, 314, 337.

requirements for approval, 314.

failure to approve bond not a defense to sureties, 314n.

dismissal of judicial proceedings for failure to comply with the law, 314.

justification of sureties, 315.

giving bond for smaller sum than is required by law, 315.

giving bond for larger sum than is required by law, 316, 343.

statutory provisions as to residence of surety, 316.

persons prohibited by law or rules of court from becoming surety, 317.

(The references are to pages.)

Judicial Bonds—Continued—

fixing penalty of bond by the court, 317.
regulation by statute as to the number of sureties, 317.
waiver of defects by acts of obligee, 320.

Consideration, 318.

giving of bond for which there is no requirement of law renders bond void for want of consideration, 318.
bond by administrator in appeal who is exempt by reason of having given administration bond, without consideration, 318.
supersedeas bond void for want of consideration if former appeal operates as stay of execution, 318.
where judgment appealed from is a nullity by reason of want of jurisdiction, bond is wanting in consideration, 318.

Material defects in form of bonds, 317.

distinction between defects which invalidate the bond and those which merely furnish grounds for dismissal of action, 317.
bonds lacking formalities of contract can not be enforced, 317, 368.
omission of defeasance clause, 318.
omission of name of judgment creditor, 318.
reciting the name of an appellate court which has no existence, 319.
exacting more onerous conditions than the law requires, 319.
parol evidence not admissible to remedy defects, 343.

Appeal or stay bonds, 312.

distinction between stay of execution and appeal, 312.
use of the term appeal interchangeably with *supersedeas*, 312.
instances where appeal bond vacates the judgment, 312.
want of jurisdiction in the appellate court resulting in dismissal creates no liability on the bond, 321, 324.
perfecting appeal by consent of obligee after the date limited by law, 321.
obligors estopped by recitals in the bond that appeal has been perfected from claiming otherwise, 321.
failure to make all parties in the lower court parties in the reviewing court, 321.
conditions upon which appeal or stay bonds become payable, 322.
affirmance as to one or more of the parties and reversal as to others constitutes a breach of the bond, 323.
addition of new party in the appellate court, 324.
when action may be brought upon bond for appeal, 327.
effect of levy of execution against principal upon right of action against surety, 327.
not necessary to first make demand upon principal before proceeding against surety, 328.
not necessary for obligee to first resort to other security before proceeding against surety, 328.
summary action upon appeal or stay bonds, 328.
measure of damages in action upon appeal or stay bonds, 329.
successive appeal bonds, 334.
defenses in actions upon appeal or stay bonds, 335.
all issuable facts necessary to the validity of the judgment are settled by affirmance of the judgment, 335.
sureties not estopped from showing fraud and collusion in obtaining the judgment appealed from, 336.
want of jurisdiction in appellate court not a defense to sureties where judgment has been affirmed, 336.
where appeal is entertained and judgment affirmed, sureties estopped from showing the appeal not perfected, 336.
appeal from a justice court, 336.

(The references are to pages.)

Judicial Bonds—Continued—*Failure to prosecute appeal, 324.*

dismissal of appeal for want of prosecution a constructive affirmance, 324.

dismissal of appeal for want of jurisdiction not a constructive affirmance, 324.

where appellant is restrained by injunction from prosecuting appeal, 325.

removal of cases by act of legislature to new appellate court not named in the bond, 325.

affirmance by consent of parties not a breach of appeal bond, 325.

agreement that action may abide the outcome of a test case is not a compromise, 326.

where appeal has been dismissed and thereafter reinstated by agreement of parties, 327.

want of capacity to prosecute appeal is a breach of the bond, 327.

Administration bonds, 375.

distinction between bonds of officers of the court and public officers, 375.

duties for which administrators are chargeable, 375.

liable for failure to administer estate in accordance with last will and testament, 375.

no justification that officer was advised by counsel to do wrongful act, 376.

chargeable with negligence and bad judgment in investing funds of the estate, 376, 387.

liable for failure to resist the allowance of unjust claims, 377.

refusal to pay allowed claims, 377.

failure to pay heir his distributive share, 377.

failure to observe the order of preference in the distribution of assets, 377.

neglect of administrator to file account, held constructive conversion, 377.

failure to file inventory, considered breach of the bond, 377.

scope of liability upon bond, 378.

covers all assets whether coming into the hands of the officer before or after the execution of the bond, 378, 387.

covers conversions before execution of bond, 378n, 387.

statements in report of officer charging himself with assets he never received, not conclusive against sureties, 378.

funds collected under color of office, but not properly assets of the estate, 379.

bond covers all defaults in reference to land of decedent, although the officer has no authority touching the land, 379.

if administrator is debtor of the estate he must account for the debt on his bond, 379.

not liable for failure to account for collection of rents in the right of heirs, 380.

expense of administration not chargeable against the bond, 380.

failure to pay attorney fees in accordance with order of court, a breach of bond, 380.

successive administration bonds cumulative, 380.

ancillary administration bond not cumulative with bond given in the principal administration, 381.

when judgment or order of court is necessary to action on bond, 381.

not necessary to have execution against administrator before instituting action on bond, 382.

sureties concluded by judgment against the principal, 383.

judgment for principal conclusive in favor of sureties, 383.

(The references are to pages.)

Judicial Bonds—Continued—

- sureties not estopped from showing judgment was obtained by fraud, 383.
- judgment against administrator by confession only *prima facie* evidence against sureties, 383.
- defenses to actions upon administration bonds, 384.
- conversion of trust funds with knowledge and consent of the beneficiaries will bar action on bond, 384.
- where administrator occupies a position of double trust the law makes the transfer as soon as payment becomes due, 384.
- acceptance of individual note of administrator by distributee exonerates sureties, 384.
- if executor conforms to requirements of the will, his acts will be valid although will is thereafter set aside, 385.
- no defense that the appointment of administrator was irregular, 385.
- who may maintain action on administration bonds, 385.
- bonds of guardians, 386.
- guardian liable for all property of the ward whether derived from the estate of the ancestor or other source, 387.
- special guardian bond to secure proceeds of land sale, not cumulative with general bond, 387.
- debts due the ward by the guardian become assets for which the bond is liable, 388.
- settlement of guardian's accounts, 388.
- acceptance by ward of note of guardian's settlement, a full defense to sureties, 389.
- guardian occupying position of double trust, 389.
- adjudication against guardian conclusive against sureties, 389.
- settlement procured by fraud, not conclusive, 390.

Attachment bonds, 350.

- bonds to procure attachments, 350.
- bonds to release attached property or redelivery bonds, 350, 355.
- bonds to discharge attachment, 351, 356.
- not forfeited for irregularities of execution or defects in form, 352, 355.
- want of jurisdiction resulting from defects in affidavit, a defense to sureties, 353.
- whether damages for malicious prosecution are recoverable upon bond to procure attachment, 353.
- redelivery bond does not affect validity of attachment, and action for wrongful attachment may be thereafter maintained, 355.
- no recovery on redelivery bond unless property is actually delivered to defendant, 356.
- bond to discharge attachment is a final disposition of attachment proceeding and admits its validity, 356.
- if attachment void by reason of prohibition of law, bond to dissolve is void, 357.
- release of sureties by substitution or addition of new parties, 358, 363.
- when action accrues upon attachment bonds, 358.
- voluntary dismissal of attachment, an admission that it is wrongful, 359.
- failure of plaintiff to sustain his action, *prima facie* evidence that attachment is wrongful, 359.
- dismissal of attachment by reason of failure of officer to properly serve, 360, 364.
- attachment upon defective affidavit is wrongful, and gives rise to action on the bond, 360.

(The references are to pages.)

Judicial Bonds—Continued—

no action on forthcoming bond until final disposition of the case, 360.
 action on bond to procure attachment may be prosecuted before final disposition of case, 360.
 view that judgment in favor of principal, without adjudication of the attachment, is a constructive dissolution, 361.
 sureties are concluded by judgment against the principal, 361.
 good faith or probable cause, not a defense to action upon bond, 361.
 sureties estopped from questioning the regularity of proceedings out of which their liability arises, 362.
 truth of the affidavit for attachment can not be inquired into by the sureties, 362.
 sureties can not show that property taken is not subject to attachment, 362.
 no defense to sureties that the officer levying the writ acted without authority, 362.
 exoneration of sureties by delivering up the property seized, 363.
 discharge bond exonerated by subsequent forthcoming bond, 363.
 exoneration by amendment to process or pleading, 363.
 reference of case to arbitrators and a finding against defendant, held to create liability against surety upon discharge bond, 364.
 liability of sureties as affected by judgment in favor of some and against some of the defendants, 364.
 attachment bonds available in any court to which the case goes by appeal or error, 364.
 if judgment is appealed from but not the attachment, judgment in the appellate court does not affect the attachment, 364.
 measure of damages upon attachment bonds, 365.

Injunction bonds, 337.

injunction generally inoperative without bond, 337.
 court of equity will require bond when not provided for by statute, 338.
 no action accrues upon injunction bond until determined by judgment of court that injunction was wrongful, 339.
 dismissal of action without prejudice for want of service, not a breach of injunction bond, 339.
 dismissal of action by court for want of prosecution constitutes a breach, 340.
 voluntary dismissal by plaintiff a breach of the bond, 340.
 dismissal by agreement of parties releases sureties, 340.
 where dissolution of injunction is based upon facts arising after allowance of the writ, no liability on the bond, 340.
 dissolution of injunction on account of death of the defendant, not a breach, 341.
 dissolution for insufficient bond, constitutes a breach, 342.
 submission to arbitration, resulting in dissolution of injunction, releases sureties upon the bond, 342.
 dissolution as to part of the relief prayed for, not a breach, 343.
 no action arises upon dissolution of a temporary restraining order until final determination of the cause, 343.
 bond given after injunction has issued, without consideration, 343.
 sureties not estopped by recitals in the bond from showing that the injunction did not issue, 344.
 references in injunction bonds to records, make such record a part of the bond, 344.
 defenses of sureties upon injunction bonds, 344.
 measure of damages for breach of injunction bonds, 346, 348.

(The references are to pages.)

Judicial Bonds—Continued—

Insolvency proceedings, 390.

failure to perform order of court a breach of receiver or trustee bond, 390.

order of court fixing amount due from receiver or assignee conclusive upon sureties, 391.

Bail bonds, 391.

granting bail a judicial act, bond given without order of court a nullity, 391.

ordered by officer having no power to act, a nullity, 391.

surety estopped from asserting lack of authority if bond recites necessary jurisdictional facts, 392.

conditions in bail bonds, 392.

time of appearance, 392.

place of appearance, 394.

defenses against bail bonds, 395.

exoneration of bail, 397.

Replevin bonds, 367.

court has no authority to issue writ of replevin without bond, 367.

conditions of bond in replevin, 368.

bond valid although not conforming to statutory requirements, 368.

the officer serving the writ made the judge of the sufficiency of the bond, 368.

can not be enforced if any essential element of contractual relation wanting, 368.

not enforceable if the court has no jurisdiction of the subject matter, 369.

bond invalid if the law under which action is brought has been repealed, 409.

what constitutes breach, 369.

failure to prosecute action a breach of the bond, 369.

voluntary dismissal of the action, 369.

dismissal by operation of law or because of death of party, not a breach, 369.

dismissal for failure of proof without finding as to title, 370.

no action can be maintained on the bond until the case is finally determined, 370.

sureties concluded by final order in replevin action, 370.

final judgment will not be enlarged, by implication, to include findings not actually entered, 370n.

sureties bound by judgment although entered by confession or consent of parties, 371.

sureties not permitted to show that the property taken belonged to a stranger, 371.

measure of damages, 371.

when damages may be assessed in action upon the bond, 371.

costs and expenses including attorney fees as an element of damages, 373.

interest from the date of judgment in replevin, recoverable on the bond, 373.

defenses in action upon replevin bond, 373.

material alteration in the bond as a defense, 373.

dismissal without consent of defendant, 373.

a change of defendants by the substitution of new parties, 374.

defenses in mitigation of damages, 374.

no defense that property was destroyed by unavoidable casualty pending final action, 374.

subsequent seizure under process of law, a defense, 375.

(The references are to pages.)

Judicial Officers—

- cannot act through deputy, 245.
- liable upon their official bonds for acts performed without jurisdiction, 287.
- liability for ministerial acts, 291.
- distinguished from public officers, 375.

Judgment—

- creditor having judgment lien upon property of principal may suffer same to become dormant without impairing rights against promisor, 142.
- judgment against creditor in action against principal conclusive in favor of promisor, 148.
- promisor may have judgment against him set aside if creditor fails to recover in subsequent action against principal, 148.
- payment of judgment by the hand of the debtor is a satisfaction and releases sureties upon the supersedeas bond, 226.
- not material that the wrong date of the judgment is set out in an appeal bond, 319.
- view that judgment against the principal upon official bond is conclusive against the surety, 303.
- sureties upon bond to discharge attachment are concluded by a judgment against the principal, 361.
- against plaintiff in replevin dismissing action or finding right of property in defendant, conclusive against sureties, 370.
- judgment in replevin by confession, binds the sureties, 371.
- as to whether judgment against principal is necessary to cause of action upon an administration bond, 381.
- against principal upon administration bond conclusive against sureties, 383.
- adjudication against guardian in settlement of his accounts, conclusive against his sureties, 389.
- surety paying judgment, entitled to have an assignment of same to himself, 434.
- paid by surety, not extinguished, 442.
- against surety, *prima facie* evidence against co-surety in action for contribution, 498.
- against surety, conclusive as to his right of contribution, 517.

Jurisdiction—

- promisor upon judicial bonds estopped from denying the jurisdiction of the court, 20, 336, 344.
- liability upon bonds of judicial officers acting without jurisdiction, 287.
- distinction between acts done in excess of jurisdiction and acts done in the absence of all jurisdiction, 289.
- if judge in good faith determines he has jurisdiction, his decision, though erroneous, is judicial, and no liability arises on his bond, 290.
- if jurisdiction to issue legal process is not apparent on the writ, the burden of showing validity is on the officer serving the process, 296.
- no jurisdiction in appeal acquired, where bond not filed within statutory period, 314.
- dismissal for want of jurisdiction, not a constructive affirmation of the lower court, 321, 324.
- want of jurisdiction in attachment by reason of defective affidavit, a defense to sureties, 353.
- replevin bond invalid if court has no jurisdiction over subject matter, 369.

(The references are to pages.)

Justice of the Peace—

- issuing warrant of arrest without authority, liable for damages on his bond, 288.
- failure to issue order of arrest when required by law, a breach of bond, 292.
- failure to issue execution when required by law, a breach of ministerial duty, 292.
- appeal from, to a court of record vacates all judgments or orders, 336.
- statutory limitations as to appeal from, mandatory, 337.

Justification of Sureties—

- appeal may be dismissed for non-compliance with statute as to justification of sureties, 315.

K

Knowledge—

- suretyship contracts without the knowledge of the principal are binding upon the promisor, 67.
- immaterial whether the creditor has knowledge of the suretyship at the time the relation arises, 125.
- promise to pay deemed waiver of defense only when promise is made with knowledge of defense, 130.
- promisor discharged by a release of securities in hands of the creditor although he has no knowledge of the additional securities at the time he signs, 139n.
- promisor bound if he signs with knowledge that main contract is *ultra vires*, 150.
- promisor who signs as surety for a firm with knowledge that the partnership name was signed to the main contract by a partner without authority, will be bound, 150.
- fraud of principal, without knowledge of creditor, not a defense to promisor, 158.
- false representation of third persons without knowledge of creditor will not release promisor, 159.
- conditions imposed by promisor upon his contract without knowledge of creditor, not a defense, 200.
- promisor who pays may be subrogated although his contract was made without knowledge that creditor holds securities, 430.
- surety paying debt without knowledge that creditor has released securities may maintain action to recover back, 466.

L

Labor and Material Claims—

- surety upon building contract containing covenant to pay labor and material claims will be liable for such claims at the suit of labor and material men, 207.
- payment of labor claims to prevent liens from being perfected creates no liability upon bond to "save harmless from liens," 210.
- view that a municipality has no power to require contractor to furnish bond conditional upon the payment of labor and material claims, 208n.

(The references are to pages.)

Legislature—

bonds of public officers as affected by subsequent acts of legislature changing the duties of officers, 107a, 253.
extension of tenure of office by legislature, 256.

Letter of Credit (See Letters of Guaranty)—

advances made upon a partnership letter of credit after dissolution of the firm will not bind the guarantor, even though the creditor had no knowledge of the dissolution, 66.
notice of default required to charge the guarantor of a letter of credit, 91.

Letters of Guaranty (See Letter of Credit)—

not construed with technical precision, 19.
view that the construction should be most strongly against the promisor, 19.
view that the construction should be most strongly in favor of the promisor, 19.

Letter of Recommendation—

does not amount to a guaranty, 69.

Levy—

release of levy on property of principal will discharge promisor, 138, 144, 465.
return of writ without levy, by direction of creditor, will not discharge promisor, 143n.

Lex Fori—

statute of frauds in most jurisdictions effects merely the remedy and the law of the Forum will be enforced, 33, 54.

Liability—

commencement and duration of liability upon a bond, 204.
limited to the term of office or agency although bond recites no words of limitation, 205.

Lien—

creditor under no obligation to promisor to acquire lien upon property of principal, 138.
creditor having judgment lien upon property of principal may suffer same to become dormant without impairing rights against promisor, 142.
assignment by creditor of judgment lien against property of principal to one who purchases the property upon which lien rests destroys the lien by merger and discharges promisor, 144.
payment of labor claims to prevent liens being perfected creates no liability upon bond to "save harmless from liens," 210.
bond to indemnify mortgagee against lien not available to lienholders, 211.
of judgment, not extinguished by payment of judgment by surety, 442.

Life Estate—

payment of mortgage to protect life estate, subrogates the one paying to the rights of the mortgagee, 449.

Limitation of Actions—

creditor may proceed against surety of a decedent although action barred against the estate, 132.
creditor may recover of surety although claim barred against insolvency assignee of principal, 132.

(The references are to pages.)

Limitation of Actions—Continued—

- actions barred against public officers also barred against their sureties, 133.
- view that surety who pays may recover from principal although action of creditor against principal is barred, 133, 514.
- when limitations upon bond begins to run, 228.
- conflicting views as to whether a fraudulent concealment by the principal of default prevents the operation of statute as to surety, 228.
- against sureties upon official bonds, 305.
- statute begins to run from the time demand is made for settlement, 305.
- when demand will be presumed, 305
- creditor subrogated to securities held by surety, although the latter discharged by statute of limitations, 459.
- if action of surety against principal is barred by statute of limitation, the right of subrogation deemed waived, 472.
- surety paying debt barred by statute cannot recover contribution, 496.

Limited Guaranty—

- conflicting views as to whether a guaranty without express limitations is continuing or limited, 70.
- parol proof held admissible to determine whether guaranty is limited or continuing, 72n.

Lunacy (See Insanity)—

M

Maker—

- addition of new party as principal maker without consent of promisor will discharge promisor, 105.

Malicious Prosecution—

- whether damages for, can be recovered upon attachment bond, 353.

Mark—

- signature to memorandum by mark of the party to be charged, satisfies requirements of statute of frauds, 36.

Married Women—

- in some states may become promisors in suretyship the same as men, 12a.
- if a substituted contract is void by reason of coverture the creditor will be restored to his rights under original contract, 137.
- if principal is incapacitated by reason of coverture, such defense is not available to the promisor, 149.
- wife paying mortgage, subrogated to the lien and priority of the security, 449.
- one advancing necessities to wife, not subrogated to rights of wife against husband, 469n.

Marshal (See Sheriff and Constable)—

Measure of Damages—

- penalty of a bond fixes limit of recovery, but only so much can be recovered as adequately measures the damage sustained, 218.
- if no damages are shown, nominal damages recoverable, 218.
- upon bond to secure an annuity, is the amount of payments in default and not the penal sum named, 218n.

(The references are to pages.)

Measure of Damages—Continued—

- stipulations in building contracts for payment of fixed sum per day for delays, amount to liquidated damages, 219.
- where condition of bond is the due compliance with law, the penalty named presumed to be liquidated, 220.
- interest as an element of damages, 222, 333, 347.
- in action upon appeal or stay bonds, 329.
- in action upon injunction bonds, 346, 348.
- in action upon attachment bonds, 365.
- in action upon replevin bonds, 371.

"Mercantile Amendment Law"—

- as to the consideration of suretyship contracts, 30.
- as to the right of subrogation to the surety who pays, 429.
- as affecting the lien of judgment paid by surety, 440.

"Memorandum or Note"—

- the memorandum required by the statute of frauds is not the contract itself, 33, 34, 35.
- contract to pay the debt of another need not be in writing if the memorandum is written, 33.
- statute does not require the "memorandum" to be signed by both parties, 34.
- not necessary that it appear all on one paper, 34.
- the several papers constituting the memorandum must either refer to each other or each be signed by the party to be charged, 34, 35.
- if the party to be charged signs by initials it will be sufficient to satisfy the statute of frauds, 36.
- a printed signature, if affixed by authority is a sufficient compliance with the statute, 36.
- a signing upon any part of the memorandum is sufficient, 36.
- signature upon the blanks used by the sender of a telegram is a sufficient signing of the "memorandum" required by the statute of frauds, 36.

Merger—

- assignment by creditor of judgment lien against property of principal to one who purchases the property on which the lien rests, destroys the lien by merger and discharges promisor, 144.
- no merger against creditor, when surety purchases land upon which his indemnity mortgage rests, 460.

Ministerial Acts—

- defined, 291.
- judicial officer liable for failure to perform ministerial duty, 292.
- duty of granting writ of *habeas corpus*, held ministerial, 292.
- issuing order of arrest by justice of the peace, considered ministerial, 292.
- failure of justice of the peace to issue execution, a breach of ministerial duty, 292.

Minor (See Infancy)—

Misconduct—

- of creditor resulting in the release of collateral or liens held as additional security will discharge the promisor, 140.
- no duty rests upon creditor to disclose misconduct of principal in other transactions, in the absence of special inquiry, 154.
- misconduct of the principal as a defense in suretyship, 158.
- delivery of suretyship obligations by the principal without complying with conditions imposed by promisor, 159.
- of surety in contributing to default of principal, a bar to right of contribution, 485.

(The references are to pages.)

Misrepresentation—

- promisor may avoid his contract for a fraudulent misrepresentation of facts, 150.
- failure to disclose information by the creditor when inquired of amounts to affirmative misrepresentation, 152.
- acceptance by creditor of promise of surety with knowledge of facts affecting risk, held an implied misrepresentation, 154.
- misrepresentation made to the promisor by the principal, not a defense, 159.
- false representation by a third person with knowledge of creditor will not release promisor, 159.
- misrepresentation applies only to present or past transactions, 162.

Mistake—

- suretyship instrument will be reformed to correct mistake, 18, 104.
- mistake in the name of the promisee in suretyship cannot be corrected by parol, 64.
- recitals of a bond cannot be corrected in an action on the bond by parol evidence showing mistakes, 202.

Mortgage—

- where mortgage covers two pieces of property a conveyance of one places the alienated piece in the situation of a surety, 127.
- failure to file mortgage given to creditor by principal, resulting in loss from intervening liens will discharge promisor, 141, 465.
- failure of creditor to foreclose a mortgage held as additional security will not discharge promisor, 141.
- one advancing money upon a defective mortgage, subrogated to liens paid off with his advancement, 428.
- surety paying debt secured by mortgage, subrogated to rights of mortgagee, 444.
- cancellation of mortgage by creditor after payment by surety, effect upon right of subrogation, 444, 462.
- rule as to tacking to mortgage the subsequent advances of the creditor, 446.
- indorser paying, subrogated to mortgage security held by creditor, 448.
- wife paying mortgage, subrogated to lien and priority of the security, 449.
- payment of mortgage to protect life estate, 449.

Mortgagee—

- must observe the rights of the vendor as surety, where land is sold subject to a mortgage which the vendee agrees to pay, 25, 125.
- bond to indemnify mortgagee against liens under building contract, not available to lienholders, 211.

Mortgagor—

- in the situation of a surety where property is sold subject to mortgage, 125, 448.
- rule in the Federal courts as to suretyship relation between mortgagor and purchaser who assumes mortgage, 126.

Municipality—

- view that a municipality has no power to require contractor to furnish bond conditional upon the payment of labor and material claims, 208n.

(The references are to pages.)

N**Name—**

- essential to the validity of a bond that it recite the name of the obligee, 190.
- not necessary that the name of the obligor appear in the body of the bond, 191.

National Banks (See Banks)—

- cannot contract in suretyship except as it may be necessary in order to transfer commercial paper by indorsement, 12c.
- the powers conferred by the National Banking Act give implied authority to become surety or guarantor in the negotiation of commercial paper, 12c.

Negligence—

- of creditor resulting in loss of securities will discharge promisor, 140.
- failure to file mortgage given creditor by principal is negligence and will discharge promisor, 141.
- negligence of officers of the law in executing legal process, considered as negligence of the creditor, 144.
- fraud will not be imputed because the creditor by reason of negligence does not know of facts materially affecting the risk of the promisor, 154.
- public officers liable upon their bond for negligence, 265.
- sureties of public officers not released by the negligence of other officials, 270.
- administrator chargeable with negligence in investing trust funds, 376.

Negotiable Instruments—

- transfer of, carries with it a guaranty of the paper without special assignment of the guaranty, 63.
- extension of time as a defense under Negotiable Instrument Codes, 128.

Notary Public—

- is a public officer, 241.
- sureties liable if notary uses his office for a wrongful purpose, 294.
- liable on his bond for negligent performance of duty, 294.
- sureties liable although officer acts without any intent to violate his duty, 294.

Notice—

- surety not entitled to notice of default, 6, 157.
- guarantor entitled to notice of default in certain cases, 6, 86, 89.
- if the facts upon which the liability of the guarantor rests are not within the knowledge of the guarantor or depend upon the creditor's option notice of default is required, 90.
- when a guarantor is entitled to notice of advancement made under the guaranty, 78.
- when notice of acceptance of guaranty necessary to charge the guarantor, 77.
- notice of default required to charge the guarantor of a letter of credit, 91.
- suretyship by operation of law imposes duties upon creditor who has notice of the relation, 124.
- statutory provisions as to notice by the promisor to the creditor to sue the principal, 175.

(The references are to pages.)

Novation—

- promise to pay the debt of another based upon a special benefit to the promisor is a novation and not within the statute of frauds, 45, 48.
- if credit is given wholly to the promisor a novation arises, and a verbal promise will be binding, 42, 43.
- if the promise to pay the debt of another is upon the condition that the principal debtor be discharged, the promisor is substituted for the principal, and his undertaking need not be in writing, 44.
- does not arise unless the new contract is valid and upon which the creditor may have action, 136.

O**Oath of Office—**

- a distinguishing characteristic of public office, 240.

Obligee—

- essential to the validity of a bond that the instrument recite the name of the obligee, 190.
- right of obligee to fill blanks in incomplete bonds, 195.

Obligor—

- not necessary that the name of the obligor be recited in the body of the bond, 191.

Offer to Pay—

- distinction between tender and offer of payment, 135.

Officer (See Public Officers)—

- or corporation cannot bind the corporation in a suretyship engagement unless in pursuance of a direct authority, 12b.

Official Bonds (See Public Officers)—

- distinction between public office and employment, 237.
- indicia of public office, 241.
- will be binding although not conforming to the requirements of statute, 242.
- will be binding although not required by law, 243.
- not valid if given in pursuance of an unconstitutional statute, 244.
- signature of principal not essential to the validity of official bonds, 248.
- if statutes require signature of principal, waiver of such signature must be shown in order to hold sureties, 248.
- second bond given in the same term cumulative, 263.
- if new bond recites that it is in substitution of former bond it will exonerate first sureties, 263.
- view that the relation of debtor and creditor rather than trust exists between a public officer and the people as to public funds, 265.
- presumption that official duty has been performed, 297.
- collection of judgment against surety may be enjoined, if in separate action against the principal the judgment is in favor of principal, 305.
- limitations upon action on official bonds, 305.

(The references are to pages.)

Official Bonds—Continued—

Alteration of official duties, 253.

- subsequent legislation imposing new duties upon public officers as a defense to their sureties, 107a, 253.
- sureties give implied assent to the addition of new duties of the same general character, 255.

Approval of sureties, 246.

- disability of sureties, 246.
- property qualifications, 247.
- approval is a judicial act, 247.
- presumed from the acceptance of bond, 247.
- failure to approve, not a defense, 248.
- public officer approving bond with insufficient sureties, liable on his bond, 264.

Delivery of bond, 249.

- time of delivery provided for by statute, 249.
- vacation of office by failure to file bond as required by law, 249.
- filing bond after time fixed by law, not a defense to sureties, 251.

Scope of liability.

- if bond is given for a term of office it will cover defaults before delivery of bond, where the officer fails to make seasonable delivery, 252.
- will not cover extension of tenure of office by act of legislature, 256.
- will include the entire term and such further time as is necessary to install the successor in office, 257.
- liable for negligence and want of capacity, 264.
- not liable for errors of judgment where proper effort is made to ascertain the duty to be performed, 264.
- liable to any one damaged by failure to perform ministerial duties, 264.
- not protected by advice of counsel, 265.
- liable for interest collected upon public funds, 265.
- cases holding the officer not liable to account for interest on public funds, 268.
- not liable for failure of officer to perform his contracts with persons dealing with him in his official capacity, 269.
- not liable for failure to account for money received outside the scope of the office, 271.
- acts performed under authority of a superior officer, but outside the scope of office, 273.
- not liable for failure to account for money borrowed without authority, 274.
- liable for loss of public money by failure of bank used as public depository, 280.
- loss of public money by theft or robbery, 284.
- sureties not liable for loss resulting from irresistible superhuman force, 286.

Defenses of sureties.

- defenses growing out of contract relations cannot generally be interposed, 240.
- sureties discharged by alterations in the bond to which they do not consent, 252.
- alterations beneficial to surety are a defense, 252.
- immaterial alterations not a defense, 252.
- addition of new name as surety not a material alteration, 253.
- mutilation of the bond by accident not a defense, 253.
- an increase or diminution of the compensation of public officers not a defense, 255.
- concealment of previous misconduct not a defense, 258.

(The references are to pages.)

Official Bonds—Continued—

sureties not released by the negligence or misconduct of other officials, 270.

sureties may stand upon the exact term of the bond, 295

sheriff or constable acting within the terms of the mandate of the court, fully protected if court has jurisdiction, 295.

if process does not disclose irregularity, the officer is protected in the service even though he has knowledge of irregularity, 295.

public officers not liable for non-performance of duty, if prevented by circumstances beyond their control from exercising their functions, 296.

Evidence against sureties upon official bonds, 298.

admissions of principal, not competent against sureties, to establish default, 299.

contemporaneous declarations admissible as part of the *res gestae*, 299.

entries in books of principal, competent as admissions, 299.

if principal and surety are sued jointly, admissions of principal are competent, 300.

view that judgment against principal is not admissible against the surety, 300.

view that judgment against the principal is *prima facie* evidence against the surety, 302.

view that judgment against the principal is conclusive against the surety, 303.

judgment in favor of principal conclusive in favor of surety, 304.

Special bonds, 257.

general bond not liable for defaults of the special, nor special bond liable for acts in the line of general duty, 257.

if special bond is required by law, the general bond not liable for defaults in the special duty, even though special bond is not given, 258n.

Retroactive liability upon bonds, 259.

bonds of public officers cover only the period named in the bond, 259.

liability of sureties where officer holds office several terms, 259.

presumption that liability arose in the last term, 259.

liability of sureties where officer pays defalcations of one term with moneys received during another term, 260.

where officer borrows money to make good a shortage, and repays loan with public funds of a later term, 261.

where officer holds over without bond and converts public funds after the expiration of his term, 261.

where the holding over is contrary to law, sureties of former term can not be held, 262.

effect of approval of accounts at close of first term as to the liability of second term sureties, 262.

where wrongful act is partly in one term and partly in another, 263.

supplemental bond given in same term liable for defaults committed before its execution, 263.

Judicial officers.

acting without jurisdiction liable on their bond, 287.

justice of the peace issuing warrant of arrest without authority, 288.

imposing sentence of imprisonment where the law only gives authority to impose fines, 288.

no liability for acting in excess of jurisdiction, 288.

if judge in good faith determines he has jurisdiction, his decision, though erroneous, is judicial, and no liability arises on his bond, 290.

liable for failure to perform ministerial duties, 291.

(The references are to pages.)

Official Bonds—Continued—

duty of granting writ of *habeas corpus*, held to be ministerial, 292.
 issuing order of arrest by justice of the peace considered ministerial, 292.

failure of justice to issue execution a breach of ministerial duty, 292.

probate judge held liable for issuing marriage license to a minor, 293.

Sheriff and constable bonds.

liable for damage to property taken in execution of attachment, 264.

trespass and other wrongs committed *colore officii*, 274, 279.

levying upon property of a stranger to the writ, 275.

selling property exempt from execution, 277.

use of unnecessary force in making arrest or preventing escape, 277.

acting upon a void writ, 278.

cases holding that sureties are not liable for wrongs committed *colore officii*, 279.

surety paying loss resulting from act of deputy, subrogated to rights of principal on the bond of the deputy, 438.

Deputies, 244.

distinguished from assistant or employee, 244.

bonds construed as official, 246.

sheriff liable for official acts of his deputy, 293.

sheriff not liable for the tort or fraud of his deputy, 293.

government officers not liable for the acts of deputies, 294.

Original Promisor—

a promise for the benefit of one made upon the credit of two, makes both original promisors, 43.

P**Parol Evidence—**

competent to show the character in which accommodation parties sign negotiable instruments, 8, 481, 502.

terms of incompetent contracts may be shown by parol in some instances, 21.

authority of agent to execute suretyship contract may be shown by parol except where statute of frauds otherwise provides, 24, 28.

when the consideration of suretyship may be shown by parol, 31, 199.

the agreement to pay the debt of another may be shown by parol if the preliminary memorandum is in writing, 33, 34.

held admissible to determine whether a guaranty is limited or continuing, 71n.

competent to show that the language employed in a suretyship contract was intended to have a special meaning, 58, 203.

mistake in the name of the promisee cannot be corrected by parol so as to enable another person to maintain action upon a contract of suretyship, 64.

agreement to extend time of payment of principal contract may be shown by parol, 121.

waiver of defenses may be shown by parol, 130.

a condition precedent may be shown by parol, 164, 167.

promisor cannot show by parol that his contract is to be performed only upon contingency, 164, 168.

failure of consideration may be shown by parol, 166, 167.

accommodation indorsement in blank may be shown by parol to be the contract of an indorser, 167.

(The references are to pages.)

Parol Evidence—Continued—

exoneration of promisor may be shown by parol, 168.
 not admissible to supply omissions in incompleated bonds, 191.
 rule where bond is delivered with an understanding as to how it is to be completed by the holder, 195.
 consideration of a bond recited in the instrument can not be contradicted by parol, 199.
 agreements modifying recitals of a bond can not be shown by parol, 202.
 fraud in obtaining signature of promisor may be shown by parol, 204.

Parties to Actions—

if principal and promisor are both parties to action by the creditor, equitable set-off against the creditor in the right of the principal accrues to the promisor, 179.
 statutory provisions as to the right to make both principal and promisor parties to the action, 180.
 who are proper parties to actions upon bonds, 231.
 if instrument is under seal only those named as parties therein can maintain action upon it, 231.
 if instrument not under seal anyone having beneficial interest can maintain action, 231.
 bond to administrator or guardian in representative capacity may be sued upon in individual capacity, 232.
 if obligee is deceased his administrator may bring action upon bond, 232.
 all parties for whose benefit bond is made must join as plaintiffs in action for breach, 233.
 where bond secures separate rights the remedy is by separate actions, 233.
 if bond is joint and several anyone or more of the obligors may be joined as defendants, 234.
 if obligors severally liable they can not be joined except under Code provisions, 234.
 joinder of defendants where one co-obligor is deceased, 234.
 sureties upon successive bonds may be joined in one action as defendants, 234.
 appeal bond, as affected by the addition of new party in the Appellate Court, 324.

Parties to Suretyship Contract—

three parties required in a suretyship undertaking, 4.
 must be under no disability, 12.
 corporation may become a promisor in suretyship if the transaction is in the regular course of its business, 12a.
 a partnership can become a promisor in suretyship by its firm name, 12b.
 the addition of a new party as a principal maker as a defense to the promisor, 105.
 substitution of new parties is a material alteration of contractual relations and discharges promisor, 109.

Partner (See Partnership)—

retiring partner, is placed in the situation of a surety, where the remaining partner assumes the firm debts, 24, 125, 448.
 partner who pledges his individual property to secure a firm debt is in the situation of a surety, 25.
 retiring partner, after dissolution, discharged from partnership debts by extension of time to remaining partner, 125.
 guarantor to retiring partner against firm debt, effect of breach of promise as to resuming business, 163.

(The references are to pages.)

Partnership (See Partners)—

can become promisor in suretyship in its firm name, 12b.
 one partner can not bind the firm in suretyship without express authority, 12b.
 unauthorized signing of firm name to suretyship contract will bind the individual member who affixes the signature, 12b.
 if suretyship contract is within the usual scope of the business of the firm it will be binding, although executed by one member of the firm without express authority, 12b.
 advances made upon a partnership letter of credit after dissolution of the firm will not bind the guarantor, even though the creditor had no knowledge of the dissolution, 66, 110.
 retiring partner after dissolution, in situation of a surety, 125.
 promisor for a firm who signs with knowledge that the partnership name was signed to the main contract by one partner without authority, will be bound, 150.

Past Transaction—

not a sufficient consideration to support a suretyship, 16, 199.

Payment—

guaranty of payment distinguished from a guaranty of collectibility, 6n.
 change in place of payment will discharge the promisor who does not consent, 101.
 application of payment by the law, where parties themselves make no application, 134.
 in the absence of stipulations by the party paying, the creditor may apply to unsecured debt, 134.
 refusal to accept tender of payment made by principal will release promisor, 135.
 distinction between tender and offer of payment, 135.
 if payment by principal is void, liability is revived against promisor, 135.
 discharge of promisor by acts equivalent to payment, 226.
 when the note of the principal is equivalent to payment, 227.
 possession of bond by surety, a presumption of payment, 227.
 in full, must be made before the equity of subrogation arises, 430.
 by persons in the situation of a surety, right of subrogation, 447.
 surety may enforce contribution, although payment was without compulsion, 495.
 surety may enforce indemnity against principal for part payment, 507.
 acceptance by creditor of negotiable note of promisor, equivalent to payment, 509.
 view that non-negotiable note is not equivalent to payment, 510.

Penalty—

if penalty of a bond is left blank the omission can not be supplied without the consent of the obligor, 22, 191.
 if penalty named is greater than is required by law, the surety not bound for the excess, 23, 343.
 can not be enlarged by a contemporaneous agreement, 220.
 official bond with penalty in excess of statutory requirement, valid to the amount of required penalty, 242.
 requirements of the statute deemed waived as to amount of penalty where the parties themselves fix the penalty, 317.

Personal Suretyship—

defined, 3.
 distinguished from real suretyship, 3.

(The references are to pages.)

Place of Payment (See Payment)—

Pleading—

- petition or declaration upon contract in suretyship need not aver that such contract is in writing, as a compliance with the statute of frauds is a matter of proof and not of pleading, 52.
- demurrer to pleading will not raise the question of a non-compliance with the statute of frauds, except where a verbal contract is affirmatively pleaded, 52.
- statute of frauds not available as a defense to a suretyship contract unless pleaded, 53.
- the question of a non-compliance with the statute of frauds can not be put into the record by a request to charge, 53.
- defendant may plead the statute of frauds, although admitting in his answer the making of the contract, 53.

Postmaster—

- held liable on his bond for defaults of his deputy, 294n.

Premium—

- as affecting the contract of the corporate surety, 410.

Presumption of Fact—

- irregular indorser presumed to be guarantor, 8n.
- irregular indorser presumed to be surety, 8n.
- presumption of irregular indorsement may generally be rebutted, 8.
- presumption as affected by the fact being shown whether the indorsement was before or after delivery, 10.
- presumption as to contract of irregular indorser signing before delivery, 11.
- consideration of a bond is presumed until contrary is shown, 199.
- possession of bond by surety is a presumption of payment, 227.
- approval of bond of public officer is presumed from its acceptance and retention, 247.
- the due performance of official duty will be presumed, 297.
- no presumption that public officer has authority to do what he has undertaken, 298.

Principal—

- one for whose account the contract was made, 4.
- guaranty for one principal can not be enforced if advancements are made to more than one, 65.
- guaranty for joint principals not held for advancements made to one, 65.
- if guaranty is absolute, not necessary to first pursue and exhaust the principal, 73.
- fraud practiced by the principal on the promisor without knowledge of the creditor will not discharge the promisor, 15, 158.
- necessary for principal to sign bond where obligation is joint, 191.
- not necessary for principal to sign if principal is bound without reference to bond, 191.
- change in amount of compensation of principal, not a material alteration of main contract, 214.
- signature of principal to official bond, not essential to its validity, 248.

Priority—

- surety paying debt of another, entitled to the priority held by the creditor, 438.
- wife paying mortgage, subrogated to priority of the security, 449.
- creditor will have priority in proceeds of mortgage given to surety over debts due the surety secured by same mortgage, 460.

(The references are to pages.)

Private Obligations—

distinguished from official duty, 189.

Prohibition by Statute (See Statutes Relating to Suretyship)—

Promise—

meaning of the words "promise" and "agreement" as used in the statute of frauds, 30.

oral promise to pay the debt of another will be binding if the promisor signs a "memorandum" or "note" of the promise, 33.

a promise made to the debtor to pay his debt is not within the statute of frauds, 37.

promise of indemnity not within the statute of frauds, 37.

verbal promise to indemnify another as surety, not an undertaking within the statute of frauds, 38.

the doctrine of *Thomas v. Cook*, 38.

the doctrine of *Green vs. Cresswell*, 38, 39.

American decisions as to whether a promise of indemnity is within the Statute of Frauds, 40.

failure to keep promise by creditor not a defense to surety or guarantor where such promise is not made condition of the contract, 162.

if the thing promised is known to be impossible it will amount to deceit, 162.

essential to the validity of a bond that the instrument recite a promise to pay or perform the obligation secured, 190.

Promisor—

defined, 4.

who may become promisor in a suretyship contract, 12.

release of promisor by creditor, 168.

paying debt, entitled to indemnity from principal, 503.

Promissory Note—

execution of note for usurious interest, a good consideration for extension of time to principal, 118n.

execution and delivery of new note payable at a later date, extends time of original obligation and releases promisor, 119.

giving note for past due obligation, not an extension of time, 120.

if note given in renewal is invalid, the old note, though surrendered, is revived, 136.

when note of principal to a creditor is a payment which releases promisor, 227.

acceptance by distributee of the individual note of administrator or guardian releases the sureties, 384, 389.

payment by surety with note gives immediate right of contribution from co-surety, 487.

contribution between parties to bills and notes, 501.

acceptance by creditor of negotiable note of promisor, equivalent to payment, 510.

Public Money—

liability of public officers to account for interest upon public funds, 265.

lost by failure of bank, liability of sureties of officer, 280.

lost by theft or robbery, 284.

Public Officers (See Official Bonds)—

who are public officers, 237.

duty of public officers distinguished from private obligations, 189.

franchise of public office is not contractual, 237.

distinction between contractual and official relations, 239.

(The references are to pages.)

Public Officers—Continued—

- sureties upon official bonds contract with reference to reserved power of the sovereign to control the tenure and duties of the office, 240, 253.
- alteration in the official relations between the officer and the State not a defense, 240.
- official oath is a distinguishing characteristic of public office, 240.
- notary public is a public officer, 241.
- attorney-at-law a public officer, 241.
- test of public office, 241.
- duty of officer to give bond arises from statute, 241.
- liable for breach of duty, although no bond is given, 242.
- official bond valid, although not conforming to statute, 242.
- giving a joint bond where statute requires joint and several, 243.
- sureties not released by omission of seal from official bond, 243.
- official bond given without requirement of law is binding, 243.
- official bonds required by unconstitutional statutes, invalid, 244.
- bonds of deputies, 244.
- vacation of public office by failure to deliver bond within the time required by law, 249.
- alterations of bonds of public officers as a defense to sureties, 252.
- change in the duties of public officers by subsequent legislation, 107a, 253.
- when sureties upon official bonds not liable for defaults in added duties, 254.
- sureties not discharged by change in the compensation of public officer, 255.
- extension of tenure of office by legislative act, 256.
- bonds of, not retroactive, 259.
- by accepting office impliedly warrant that they have capacity to fill the position, 264.
- sureties of, liable for failure to account for the use of public funds, 265.
- cases holding the officer not liable to account for interest on public funds, 268.
- duty of, to act under unconstitutional law, 273.
- trespass and other wrongs committed by sheriff or constable *colore officii*, 274, 279.
- liable for loss of public funds by failure of bank used as public depository, 280.
- loss of public money by theft or robbery, 284.
- sureties not liable for loss resulting from irresistible superhuman force, 286.
- liability of judicial officers upon their official bonds, 287, 291.
- government officers not liable for acts of deputies, 294.
- not liable for non-performance of duty if prevented by circumstances beyond their control from exercising their functions, 296.
- may refuse to act under unconstitutional statutes, 296.
- the due performance of official duty will be presumed, 297.
- no presumption that officer has authority to do what he has undertaken, 298.

Public Policy—

- stipulation that amount paid by surety is conclusive against principal, void as against public policy, 421.
- agreements to appoint deputies, void as against public policy, 245.
- against public policy to imply a promise of indemnity in favor of surety upon bail bond, 504.

(The references are to pages.)

Q**Qualification of Sureties—**

upon bonds of public officers, 246.

as to residence within the jurisdiction where bond is filed, 247, 316.

R**Ratification—**

suretyship contract by infant becomes valid only when ratified by him after reaching maturity, 12a.

an unauthorized signing of a firm name to a suretyship contract will bind the partnership if ratified by the firm, 12b.

if signature to a suretyship engagement is affixed by an unauthorized agency, a subsequent ratification will validate the transaction, 36.

Real Suretyship—

defined, 3.

mortgage and pledge the subject of real suretyship, 4.

Re-Arrest—

of accused after escape exonerates surety upon bail bond, 398.

Recognizance (See Bail Bonds)—**Redelivery Bond—**

conditions of, 355.

does not bar action to dissolve attachment, 355.

will be binding if property is released, although not in form required by statute, 355.

failure to secure order of court, although required by law, will not invalidate bond, 356.

not liable unless the property is actually delivered, 356.

no action upon forthcoming bond until a final disposition of the case, 360.

Receiver—

considered the "hand of the Court," 390.

failure to perform the order of the Court, a breach of bond, 390.

order fixing the amount due, conclusive upon sureties, 391.

sureties of, may follow and subject trust funds in the hands of third person, 435.

Recitals of the Contract—

promisor estopped from denying, 20, 215, 321, 336.

not estopped from denying recitals inserted by fraud, 20, 217.

liability upon bond limited to the recitals of the instrument, 203.

that injunction has been allowed, not conclusive against sureties, 344.

Recording Mortgage—

failure of creditor to record mortgage held as additional security will discharge promisor, 141, 142.

Reference to Other Instruments—

incorporation of other instruments into a bond by reference, 196.

by-laws of a corporation incorporated into a bond by reference, 198.

(The references are to pages.)

Reformation of Contract—

- if contract is induced by fraud or mistake it will be reformed in equity, 18.
- alterations in contract resulting from accident or mistake reformed in equity, 104.

Regular Indorser (See Indorser)—

Release—

- whatever releases principal will release promisor, 146.
- release of co-promisor by the creditor, 170, 498.
- release of co-promisor reserving rights against remaining promisors, 172.

Release of Security Held by Creditor—

- discharges promisor *pro tanto*, 137, 465.
- promisor discharged whether the lien or security was acquired at the time of the execution of the suretyship contract or later, 138.
- view that promisor is discharged by release or securities even though other securities remain in hands of creditor sufficient to satisfy the debt, 139.
- substitution of other securities of equal value or compromise in good faith of disputed collateral will not release promisor, 140.
- promisor discharged by loss of security resulting from the negligence of creditor, 140.
- the use of ordinary care relieves the creditor from responsibility to the promisor for securities which are stolen, 140.
- if securities held by creditor are lost by operation of law the promisor will be discharged, 143.
- release of property of principal in possession of the creditor, but not held as security, not a defense to promisor, 145.
- release of levy of execution upon property of principal will discharge promisor, 138, 144, 465.
- release of levy of execution upon property of one of several co-promisors will discharge remaining promisors *pro tanto*, 172.
- if surety pays without knowledge that creditor has released securities he may maintain action to recover back, 466.

Rents and Profits—

- not covered by appeal bond in foreclosure, in the Federal Courts, 330.
- covered by appeal bond in action for ejectment, 332.

Replevin—

- purpose of replevin action, 367.
- Court has no authority to issue writ without bond, 367.
- conditions of bonds in replevin, 368.
- bond valid, although not conforming to statutory requirements, 368.
- the officer serving the writ made the judge of the sufficiency of the bond, 368.
- bond can not be enforced if any essential element of contractual relation wanting, 368.
- bond not enforceable if the court has no jurisdiction of the subject matter, 369.
- bond invalid if the law under which action is brought has been repealed, 369.
- no action can be maintained upon bond until the case is finally determined, 370.
- sureties upon bond concluded by final order in replevin action, 370.

(The references are to pages.)

Replevin—Continued—

final judgment will not be enlarged, by implication, to include findings not actually entered, 370n.

sureties bound by judgment, although entered by confession or consent of parties, 371.

sureties not permitted to show that the property taken belonged to a stranger, 371.

Breach of bond, 369.

failure to prosecute without delay, 369.

voluntary dismissal of action, 369.

dismissal by court for want of jurisdiction, 369.

dismissal by operation of law or because of the death of party not a breach, 369.

dismissal for defect of process, 370.

dismissal without a finding as to title, for failure of proof, 370.

Defenses in action on bond, 373.

material alteration of the bond, 373.

dismissal of action without consent of the defendant, 373.

change in the defendants by substitution of new parties, 374.

defenses in mitigation of damages, 374.

the increase in value of property during detention by reason of the addition of labor to it, set off in mitigation of damages, 374.

no defense that property was destroyed by unavoidable casualty pending final action, 374.

subsequent seizure under process of law a defense, 375.

Measure of damages upon bond, 371.

defendant entitled to full compensation for his loss, 371.

damage to defendant's business by unlawful detention, 371.

if damages not assessed in replevin action, may be assessed in action on the bond, 372.

costs and expenses including attorney fees as an element of damages, 373.

interest from the date of judgment in replevin, recoverable on the bond, 373.

affidavit in replevin *prima facie* evidence of the value of the property seized, 373.

Request to Sue—

failure of creditor to sue principal when requested, not a defense, 173.

statutory provisions as to suit by creditor on request of promisor, 175.

doctrine of *Pain vs. Packard*, 176.

Res Adjudicata—

judgment against creditor in action against principal conclusive in favor of promisor, 148.

view that judgment against the principal upon official bond is conclusive against the surety, 303.

sureties upon bond to discharge attachment are concluded by a judgment against the principal, 361.

judgment against plaintiff in replevin dismissing action on finding right of property in defendant, conclusive against sureties, 370.

surety upon administration bond concluded by judgment against principal, 383.

adjudication against a guardian conclusive against his sureties, 389.

Res Gestae—

contemporaneous declaration of principal, admissible against surety as part of the *res gestae*, 299.

(The references are to pages.)

Reservation of Remedies—

- against promisor prevents the discharge of promisor by extension of time to principal, 128b.
- promisor not discharged by release of principal if remedies are reserved against the promisor in the contract of release, 146.
- release of one of several co-promisors reserving rights against remaining promisors will not discharge those remaining, 172.

Residence of Sureties—

- statutory requirements, 247, 316.

Restoration—

- when liability of surety upon mutilated bond may be revived by restoration of the instrument, 215.

Retrospective Contracts—

- guaranty will not be given retrospective effect, 66.
- bonds not retroactive unless the instrument so stipulates, 204, 259.

Revival of Obligation—

- if payment or substituted security is void, liability against promisor is revived, 135.

Revocation—

- executory contract of guaranty when and how it may be revoked, 94, 184.
- death of guarantor as a revocation, 95, 184.
- executed contract of suretyship not revocable, except by mutual assent, 184.

Rights and Remedies—

- subrogation, 426.
- contribution between co-sureties, 473.
- the right of indemnity against the principal, 503.
- promisor who pays the debt of another entitled to enforce all the remedies of the creditor, 435.

Robbery—

- liability of sureties of public officers for loss of public funds by theft or robbery, 284.
- not liable for robbery by a public enemy, 287.

S

Salary (See Compensation)—

Seal—

- historical statement as to use of seals, 192n.
- a bond is a speciality and required to be under seal, 190.
- held, signature by surety to bond not essential if instrument is under seal, 192.
- seal is a symbol of the genuineness of a bond, 192.
- one seal sufficient for several signers, 193.
- imports a consideration, 193.
- modification of effect of seals, by statutes in certain States, 193.
- where instrument recites that it was sealed by the obligor he is estopped from denying it, 216.
- if instrument is under seal only those named as parties therein can maintain action upon it, 231.
- if instrument not under seal any one having beneficial interest can maintain action, 231.
- official bond without seal is binding as a simple contract, 243.

(The references are to pages.)

Securities (See Collateral Securities)—**Set-Off—**

- principal's right of set-off against the creditor as a defense to the surety, 178, 466.
- insolvency of the creditor as a basis of equitable set-off in favor of promisor, 179, 180.
- equitable set-off, in favor of promisor, in the right of principal not allowed, except when principal and promisor are both parties to the action, 179.
- where all parties are before the court the right of equitable set-off accrues to the promisor, 181, 466.

Sheriff and Constable—

- bond of indemnity to sheriff to prevent performance of duty does not bind surety, 225.
- bond to sheriff to indemnify against consequences of an unlawful act already committed is valid, 226.
- default of, in not paying over money collected in second term upon execution levied in first term, a liability upon the first term sureties, 263.
- liable for damages to property taken in execution or attachments, 264.
- trespass, and other wrongs committed *colore officii*, 274, 279.
- levying upon property of a stranger to the writ, 275.
- selling property exempt from execution, 277.
- use of unnecessary force in making arrest or preventing escape, 277.
- acting upon void writ, 278.
- cases holding that sureties are not liable for wrongs committed *colore officii*, 279.
- liable for acts of deputy, 293.
- not liable for fraud or tort of deputy, 293.
- surety paying loss on bond, resulting from misconduct of deputy, subrogated to rights of principal on bond of deputy, 438.
- acting within the terms of the mandate of the Court, fully protected if the Court has jurisdiction, 295.
- if process does not disclose irregularity, the officer is protected in the service even though he has knowledge of irregularity, 295.

Situation of a Surety (See Involuntary Suretyship)—**Signature—**

- the Statute of Frauds does not require the suretyship contract to be signed by any one except the promisor, 34.
- if the "memorandum" of the agreement to pay the debt of another consists of several papers which refer to each other, the signing of one will satisfy the Statute of Frauds, 35.
- the requirements of the Statute of Frauds may be satisfied if the signing is by initials, 36.
- a printed signature, if affixed by authority, is sufficient compliance with the statute, 36.
- may be placed anywhere upon the writing required by the Statute of Frauds, 36.
- parties may sign on different instruments, 25a.
- the signing of blanks used by the sender of a telegram is a sufficient compliance with the Statute of Frauds as to a "memorandum" signed by the party to be charged, 36.
- the term "subscribed," employed in the New York Statute of Frauds, held to mean manual writing and to exclude a printed signature, 36n.
- surety not bound upon a joint bond unless the principal signs, 191, 249.

(The references are to pages.)

Signature—Continued—

- not necessary for principal to sign if principal is bound without reference to bond, 191.
- if signature of surety is affixed without authority a subsequent ratification will bind him, 36, 192.
- held signature by surety to bond not essential if the instrument is under seal, 192.
- if name signed to bond is followed by words descriptive of official position it will be binding as the personal obligation of the signer, 192.
- of principal to official bond, not essential to its validity, 248.

Specialty—

- a bond is a specialty, 190.
- payment by surety of a specialty debt makes of the surety a specialty creditor, 441.

Special Agency—

- doctrine of special agency as applied to promisor who signs upon condition and entrusts delivery to principal, 160, 200.

Special Bonds—

- sureties upon, not liable for defaults in the line of the general duty of an officer who has given a general bond, 257, 387.

Special Guaranty—

- can only be enforced by the one to whom it is addressed, 64.
- not assignable until right of action arises thereon, 64, 110.

Statute of Frauds—

- the purpose of, 27.
- the English statute, 27, 28.
- text of the English statute relating to suretyship, 28.
- authorship of the English statute, 28.
- the statute in force in some States provides that verbal agreements to pay the debt of another are void, 28.
- the English statute operates only on the remedy and does not render the verbal contract void, 29.
- meaning and scope of the word "agreement" as used in the statute, 29.
- view that the entire agreement including a statement of the consideration is required by the statute to be in writing, 30.
- view that the statute does not require the "agreement" to be in writing, 30-31.
- rule in Massachusetts that "agreement" is not used in the statute in a technical sense and should be treated as synonymous with promise, 31.
- the statute requires merely that a "memorandum or note" be in writing and not the agreement itself, 33.
- does not require the contract to pay the debt of another to be signed by any one but the promisor, 34.
- not necessary that the "memorandum or note" should be all upon one paper, 34.
- if the "memorandum" required by the statute is signed by the initials of the party to be charged it will be sufficient, 36.
- a printed signature, if affixed by authority, is a sufficient compliance with the statute, 36.
- signature upon blanks used by sender of a telegram is a sufficient compliance with the statute as to a "memorandum" signed by the party to be charged, 36.
- the term "subscribed" employed in the New York Statute of Frauds, held to mean manual writing and to exclude a printed signature, 36n.

(The references are to pages.)

Statute of Frauds—Continued—

- promise made to the debtor to pay his debt is not within the statute, 37.
- contract of indemnity is not within the statute, 37, 482.
- the doctrine of *Thomas vs. Cook* as to a verbal promise of indemnity against liability as surety, 38.
- the doctrine of *Green vs. Cresswell*, 38, 39.
- American decisions as to whether a contract of indemnity is within the statute, 40.
- no distinction in principle between promise to indemnify another as sole surety and those cases in which the indemnitor is also a co-surety, neither case is within the statute, 40.
- promises to pay the debt of another based upon some special benefit to the promisor, not within the statute, 42, 45, 48.
- distinction between beneficial consideration and beneficial participation in the main contract, 46.
- if credit is given wholly to the promisor the transaction is not within the statute although the advances are made to another, 42.
- if promisor is jointly liable for the debt with the principal his contract to pay is not within the statute, 43.
- promise to pay the debt of another on condition of the discharge of the original debtor, not within the statute, 44.
- promise to pay the debt of another out of property of debtor in promisor's hands need not be in writing, 46.
- promise to pay on condition that the creditor release to the debtor liens or securities belonging to the principal debtor is within the statute, 48.
- if the release of liens is beneficial to the promisor the statute does not apply, 48, 49.
- promise to pay upon condition of a transfer to the promisor of collaterals in the hands of the creditor belonging to the principal, amounts to a purchase and is not a suretyship promise within the statute, 49.
- promise to pay a pre-existing liability of the promisor—not within the statute although its performance extinguishes the liability of another, 49.
- the guaranty of the note of a third party given in payment of a debt is not within the statute, 49.
- a verbal acceptance, not within the statute where the acceptor holds funds of the drawer, 50.
- assumption of a vendor's debt by the vendee as a part of the purchase price is not within the statute, 51.
- contract of *del credere* agent is not within the statute, 51.
- petition or declaration upon a suretyship contract need not aver that such contract is in writing, 52.
- non-compliance with the statute can not be raised by demurrer except where a verbal contract is affirmatively pleaded, 52.
- the statute is not available as a defense unless pleaded, 53.
- a request to charge is not a pleading, and a non-compliance with the statute can not be put into the record in this way, 53.
- defendant may have the benefit of the statute by pleading it as a defense although admitting in his answer the making of the contract, 53.
- the law of the forum where the action is brought will prevail over the law of the place where the contract is made in construing the statute, 54.
- verbal conditions upon contracts excluded by the statute, 164.
- contract of corporate surety is within the statute, 412.

(The references are to pages.)

Statute of Limitations (See Limitation of Actions)—

Statutes Relating to Suretyship—

- persons prohibited by statute from becoming promisors in suretyship will be bound notwithstanding the prohibition, 12c, 316.
- statutory provisions regulating form and requisites of bonds are directory merely and the omission does not invalidate the contract, 22, 23, 315, 353, 355.
- failure to file bond within time prescribed by statute not a defense to the surety, 23.
- where penalty named is greater than required by statute the surety not bound for the excess, 23.
- as to whether the consideration of a suretyship contract need be expressed in writing, 30, 31, 32.
- Code provisions abrogating the common law rule as to the release of the estate of a deceased co-promisor in suretyship, 93n.
- promisor upon bond of public officers discharged by subsequent statutes changing the duties of the officer or extending time of settlements, 107a, 121.
- sureties may waive the provisions of statute intended for their benefit, 165.
- statutory provisions as to release of one of several co-promisors, 173.
- provisions as to notice by promisor to creditor to sue the principal, 175.
- as to the right to make both principal and promisor parties to the action of the creditor, 180.
- provisions requiring execution against the principal before proceeding against property of promisor, 183.
- legislative acts abolishing and modifying the effect of seals, 193n.

Stay of Execution—

- distinction between stay of execution and appeal, 312.
- use of the term *supersedas* interchangeably with appeal, 312.
- corporation signing as surety, not estopped from showing the act to be *ultra vires*, 319.
- Statutory requirements as to stay of execution*, 314.
 - limitation of time for filing, 314.
 - requirements for approval, 314.
 - failure to approve bond, not a defense to the surety, 314n.
 - dismissal of judicial proceedings for failure to comply with the law, 314.
 - justification of sureties, 315.
 - giving bond for smaller sum than is required by law, 315.
 - giving bond for larger sum than is required by law, 316.
 - statutory provisions as to residence of surety, 316.
 - persons prohibited by law or rules of court from becoming surety, 316.
 - statutes requiring the fixing of penalty of bond by the court, 317.
 - regulation by statute as to number of sureties, 317.
 - waiver of defects by acts of the obligee, 320.
- Consideration*, 318.
 - bond for which there is no requirement of law, void for want of consideration, 318.
 - bond given by administrator who is not required to give bond by reason of having given administration bond, without consideration, 318.
- Material defects in form of bond*, 317.
 - distinction between defects which invalidate the bond and those which merely furnish grounds for dismissing the action, 317.
 - bonds lacking formalities of contract can not be enforced, 317.

(The references are to pages.)

Stay of Execution—Continued—

- omission of defeasance clause, 317.
- omission of name of judgment creditor, 318.
- reciting a name of a reviewing court which has no existence, 319.
- exacting more onerous conditions than the law requires, 319.
- supersedeas* void for want of consideration if former appeal operates as stay of execution, 318.
- where judgment stayed is a nullity by reason of want of jurisdiction, bond is wanting in consideration, 318.

Immaterial defects in the contract, 319.

- forfeitures not favored, 319.
- wrong date of judgment set out in the bond, 319.
- omission of appellant's name from the bond, 320.
- omission of name of appellate court, 320.
- failure of some of the obligors to sign, 320.

Failure to perfect proceedings in the reviewing court, 320.

- want of jurisdiction in the reviewing court resulting in dismissal, creates no liability on the bond, 321, 324.
- perfecting proceedings in review by consent of obligee after date limited by law, 321.
- obligors estopped by recitals in the bond that appeal has been perfected from claiming otherwise, 321.
- failure to make all parties in the lower court parties in the reviewing court, 321.
- where appeal is entertained and judgment affirmed, sureties estopped from showing the appeal not perfected, 326.

Failure to prosecute proceedings in error, 324.

- dismissal of appeal for want of prosecution, a constructive affirmance, 324.
- dismissal of appeal for want of jurisdiction, not a constructive affirmance, 324.
- where appellant is restrained by injunction from prosecuting appeal, 325.
- removal of case by act of legislature to new appellate court not named in the bond, 325.
- where appeal has been dismissed and thereafter reinstated by agreement of parties, 327.
- want of capacity to prosecute appeal is a breach of the bond, 367.

Action upon bond to stay execution, 327.

- when may be brought, 327.
- effect of levy of execution upon property of principal, as to right of action upon bond, 327.
- not necessary to first make demand upon the principal before proceeding against the surety, 328.
- not necessary for obligee to first proceed against other security before proceeding against surety, 328.
- summary action upon stay bond, 328.

Affirmance, 322.

- to constitute breach of bond the affirmance must be such final order as gives the plaintiff right of execution, 322.
- entering an original judgment in the appellate court is not an "affirmance," 322.
- where only part of relief asked for is granted in reviewing court, 323.
- affirmance as to one or more of the parties and reversal as to others, a breach of the bond, 323.
- affirmance as the result of a failure to prosecute proceedings in error, 324.
- affirmance by consent of parties, not a breach of stay bond, 325.

(The references are to pages.)

Stay of Execution—Continued—

agreement that action may abide the outcome of a test case, not a compromise, 327.

Defenses to actions upon stay bonds, 335.

all issuable facts necessary to the validity of the judgment are settled by affirmance of the judgment, 335.

sureties not estopped from showing fraud and collusion in obtaining the judgment appealed from, 336.

want of jurisdiction in the appellate court, not a defense to sureties where judgment has been affirmed, 336.

Successive stay on appeal bonds, 334.

are cumulative, 334.

last sureties are principal obligors and the first, sureties for them, 334.

where new trial is granted and same judgment rendered upon retrial upon which error is prosecuted, the first bond remains liable, 335.

joint action may be prosecuted upon successive bonds, 335.

Stockholders—

who pay assessments for debts of corporation, in situation of sureties and entitled to contribution from those who do not pay, 483.

Stolen Securities—

the use of ordinary care relieves the creditor from responsibility to the promisor for securities which are stolen, 140.

Stranger—

mutilation of suretyship contract by a stranger will not affect liability of promisor, 104, 215.

indemnity furnished a surety by a stranger need not be accounted for to co-surety, 454.

creditor not subrogated to indemnity furnished surety by stranger, 461.

Subrogation—

definition, 426.

scope of the right, 426.

is independent of any agreement, 427.

is not limited to transactions in suretyship, 427.

extends to purchaser extinguishing incumbrance upon property, 427.

junior mortgagee who pays prior incumbrance is entitled to be subrogated, 428.

applied in favor of one paying a debt which another should have paid, 428.

as regulated by statute in England, 429.

promisor is subrogated to securities held by the creditor even though he makes his contract without knowledge that the creditor holds such securities, 430.

payment in full essential to, 430.

not necessary that payment be made wholly by the promisor, 431.

does not apply, if creditor holds the collateral to cover debts outside the suretyship, until all the debts are paid, 431.

not allowed as against the legal rights of others dealing with the principal, 432.

promisor who pays judgment subrogated to rights of creditor upon bond in stay of execution, 432.

surety upon stay bond not subrogated to prior sureties, 433.

sureties upon last bond where successive appeals are taken are not subrogated to creditor's rights against sureties upon the first appeal, 433.

(The references are to pages.)

Subrogation—Continued—

- subrogation includes the right to have an assignment of collateral held by creditor, 434.
- extends to all remedies of creditor against principal, 435.
- promisor who pays may subject trust funds in the right of the creditor, 435.
- surety upon bond to secure purchase price of land, subrogated to vendor's right to bring ejectment, 437.
- surety for judgment, subrogated to creditor's right to maintain bill in equity to subject assets, 438.
- surety who pays may maintain action to set aside fraudulent conveyance in the right of the creditor, 438.
- surety who pays loss resulting from misconduct of a deputy is subrogated to rights of principal officer against the deputy, 438.
- the creditor's right of priority passes to the promisor by subrogation, 438.
- promisor subrogated to creditor's right to recover stipulated attorney fees, 439.
- surety upon building contract who completes the building, subrogated to the reserved payments stipulated in the main contract, 439.
- surety paying judgment subrogated to the judgment lien of creditor upon property of principal, 440.
- judgment lien attaches in favor of promisor from the date of the judgment against principal, 442.
- surety is subrogated to creditors' rights against co-sureties, 443.
- promisor who pays subrogated to mortgage security held by creditor and may have foreclosure in his own name, 444.
- equity of surety paying debt secured by mortgage, superior to subsequent lien of creditor on the property, 445.
- rule as to "tacking to mortgage," its effect upon subrogation, 445.
- view that the equity of subrogation is superior to lien of creditor for subsequent advances, 446.
- applies to one in the situation of a surety, 447.
- retiring partner paying firm debt, subrogated to firm securities held by creditor, 448.
- vendee of one of two pieces of land covered by mortgage who pays the debt, subrogated to creditors' right upon the mortgage against the other piece, 448.
- vendor of land sold subject to mortgage, who pays the debt, subrogated to creditors' rights under mortgage, 448.
- regular indorser, subrogated to all the remedies of the holder against the maker, 448.
- indorser entitled to be subrogated to mortgage security held by creditor, 448.
- a wife redeeming mortgage in the interest of her dower, subrogated to the priority of the mortgage, 449.
- owner of a life estate who pays mortgage, subrogated to rights of mortgagee to the extent of the payment, 449.
- as applied to persons jointly liable for a debt, 449.
- accommodation acceptor, subrogated to securities of the drawer in the hands of the holder, 449n.
- promisor who pays, subrogated to pro-rata share of dividend derived from assets of principal, 450.
- where one co-surety is deceased, the survivor upon payment, is subrogated to creditors' rights against estate of decedent, 451.
- between co-sureties, 453.
- if several sureties are bound by separate instruments, with limited liability, although for same transaction, are not co-sureties, and not subrogated to collateral held by any one of the sureties, 433n, 478.

(The references are to pages.)

Subrogation—Continued—

- if one co-surety holds indemnity furnished by a stranger the other sureties are not subrogated to it, 454.
- between successive sureties, 454.
- where successive bonds are given in legal proceedings the sureties upon last bond can not be subrogated to creditors' right against prior sureties, 454.
- prior surety in successive legal proceedings, subrogated to rights of creditor against later surety, 455.
- view that later surety in legal proceedings is entitled to subrogation against the prior surety where the prior surety consents to the stay of execution, 458.
- in favor of creditor to securities held by surety, 459.
- creditors' rights under mortgage given the surety attach as of the date of the mortgage, 460.
- purchase of land by surety upon which indemnity mortgage rests does not operate as merger as against creditors' right of subrogation, 460.
- conveyance of land incumbered by surety's indemnity mortgage without notice of creditors' right of subrogation will defeat the creditors' priority, 460.
- if mortgage secures two debts, for one of which the mortgagee is only surety, the creditor's right of subrogation, held to be superior in the proceeds of the mortgage, 460.
- creditor not subrogated to indemnity in hands of surety furnished by a stranger, 461.
- distinction made by some courts between security given for indemnity and for payment, 462.
- indorsee subrogated to securities held by his indorser, 462.
- indorsee takes securities in hands of indorser by subrogation, subject to all prior equities, 463.
- view of the English courts as to subrogation in favor of a creditor, 463.
- creditor not subrogated where principal and surety are both in bankruptcy, 463.
- surety discharged if deprived of right of subrogation by act of creditor, 465.
- failure by creditor to file mortgage discharges surety, 465.
- release of levy of execution discharges surety, 465.
- cancellation of a judgment lien destroying surety's subrogation, 465.
- arises only when possession of principal's property by creditor or the lien, grows out of the suretyship contract, 465.
- surety for loan from bank, not subrogated to deposits of principal in the bank, 465.
- surety paying without knowledge that creditor has released securities may recover back the loss on his expected subrogation, 466.
- when surety may be subrogated to the principal's right of set-off, 466.
- not available to one who pays as a volunteer, 467.
- agent who advances for the account of his principal is not a volunteer, 469.
- view that one paying upon a moral obligation is not a volunteer, 469.
- one performing medical services, subrogated to the lien of principal upon property held for his care and support, 469.
- as applied in favor of one furnishing necessities to an infant, 469n.
- view that one advancing necessities to a wife, not subrogated to rights of wife, 469n.
- conventional subrogation, 470.
- waiver of subrogation, 472.

(The references are to pages.)

Successive Bonds—

- all sureties upon successive bonds may be joined in one action, 234, 335.
- second bond given in same term of public officer, cumulative, 303.
- successive appeal bonds, cumulative, 334.
- successive administration bonds, 380.
- subrogation between successive bonds, 433, 454.

Summary Action Upon Appeal Bonds—

- when may be brought, 328.

Supersedeas (See Stay of Execution)—

Surety—

- defined, 5.
- general and special meaning of the term, 1n.
- a favored debtor, 3n.
- inaccurate use of the word surety, 4n.
- distinguished from guarantor, 5, 6n.
- not entitled to notice of default, 6.
- extension of time to surety discharges co-surety to the extent of the contributory share of the surety whose contract is extended, 122.
- paying debt of another, entitled to have securities held by creditor assigned to him, 429, 434.
- paying a judgment, entitled to have it assigned to himself, 434.
- paying debt, subrogated to right of creditor to subject assets by creditors' bill or action to set aside fraudulent conveyance, 438.
- paying debt of another, entitled to the priority held by the creditor, 438.
- paying note containing stipulation for attorney fees, entitled to recover the fees, 439.
- entitled to be subrogated to the rights of the creditor against co-surety, 439, 443.
- entitled to foreclose in his own name mortgage security held by creditor, 444.
- subrogation, as applied to one in the situation of a surety, 447, 448.
- entitled to *pro rata* share of dividend derived from assets of principal, 450.
- entitled to dividend on entire claim against estate of deceased co-surety, 451.
- holding indemnity from the principal, must account for it to co-surety, 453.
- need not account for indemnity furnished by a stranger, 460.
- subrogation between successive sureties, 454.
- surety paying debt without knowledge that creditor has released securities may maintain action to recover back, 466.
- when surety will be subrogated to the principal's right of set-off, 178, 466.
- contribution between co-sureties, 473.
- when contribution arises between successive sureties, 478.
- surety for surety not entitled to contribution, 480.
- special contract between sureties as to contribution, may be shown by parol, 471.
- contribution between persons in the situation of a surety, 482.
- one becoming surety at request of co-surety, entitled to contribution, 483.
- contributing to default of principal, barred from contribution, 486.
- equitable exoneration before payment, 488.
- amount recoverable in contribution by surety, 489.

(The references are to pages.)

Surety—Continued—

contribution between sureties as affected by the insolvency or death of one or more co-sureties, 490.
 who has paid, may recover back from indemnified co-surety a proportionate share of the indemnity, 492.
 paying debt barred by statute of limitations, can not recover contribution, 496.
 who pays to prevent default, can not recover contribution, 496.
 amount recoverable by surety upon implied right of indemnity, 511.
 when surety can not recover from principal for payment of claims for which the principal was not liable, 513.
 who pays, may have indemnity although payment could not have been enforced, 516.
 judgment against surety conclusive as to his right of indemnity, 517.

Negotiable instruments.

irregular indorser presumed to be a surety, 8n.
 irregular indorser before delivery generally results in contract of surety, 9.
 promisor may be shown by parol to be a surety, 47.

Official bonds.

qualification and approval of sureties upon official bonds, 246.
 surety of public officer not discharged by a change in the compensation of the principal, 214, 255.
 as affected by an extension of the tenure of office, 256.
 when liable beyond the expiration of the term, 257.
 on general bond, not liable for defaults under special bond, 257.
 sureties of officers holding office several terms, 259.
 where officer pays defalcations of one term with moneys received during another term, 260.
 where officer borrows money to make good a shortage and repays loan with public funds of later term, 261.
 liability of, for conversions of public officer after the close of his term, 261.
 effect of approval of accounts at close of first term, as to the liability of the second term sureties, 262.
 liability as affected by the fact that the wrongful act of the officer is partly in one term and partly in another, 263.
 liable for interest collected upon public funds, 265.
 cases holding officer not liable to account for interest on public funds, 268.
 not liable for defaults of principal in not performing contracts with persons dealing with him in his official capacity, 269.
 not released by the negligence and misconduct of other officials, 270.
 not liable for failure of public officer to account for money received outside the scope of his office, 271.
 not liable for failure of officer to account for money borrowed without authority, 274.
 liability of sureties of sheriff or constable for trespass and other wrongs committed *colore officii*, 274, 279.
 liable for loss of public money by failure of bank, 280.
 loss of public money by theft or robbery, 284.
 sureties of public officers not liable for loss resulting from irresistible superhuman force, 286.
 judicial officers, 287, 291.

Judicial bonds.

judicial bond valid though not conforming to the law as to the number of sureties, 317, 353.

(The references are to pages.)

Surety—Continued—

- not bound, where court acquires no jurisdiction in attachment by reason of defective affidavit, 353.
- in bond to discharge attachment, concluded by judgment against principal, 361.
- upon attachment bonds, estopped from questioning the regularity of the proceedings, 362.
- exoneration of sureties in attachment proceedings, 363.
- judgment against plaintiff in replevin dismissing action or finding right of property in defendant, conclusive against sureties, 370.
- judgment by confession, in replevin binds sureties, 371.

Administration bonds.

- concluded by judgment against principal, 383.
- acceptance by distributee of individual note of administrator or guardian, releases surety, 384, 389.

Surety in Legal Proceedings (See Judicial Bonds)—

Surety of Public Officers (See Public Officers and Official Bonds)—

Surety for a Surety—

- not liable in contribution, 480.
- first sureties upon successive appeal bonds, sureties for the later sureties, 334.

Surety Companies (See Corporate Suretyship)—

Suretyship—

- defined, 1.
- embraces all forms of obligation to pay the debt of another, 1.
- includes surety guarantor and indorser, 2.
- arises only by express contract, 2.
- as related to the application of legal remedies, 308.

Suretyship Defenses—

- duress of principal as a defense, 12d, 148.
- failure to give notice of acceptance or default to guarantor, 91.
- failure to comply with restrictive conditions upon letter of credit as to amount advanced will release guarantor, 109.
- substitution of new parties, 109.
- enlargement of the business of employer increasing the risk as a defense to promisor, 113.
- delay of creditor in pursuing remedies against principal, not a defense to promisor, 131.
- payment or other satisfaction as a discharge of the promisor, 133.
- payment in part discharges promisor *pro tanto*, 134.
- refusal to accept tender by principal discharges promisor, 135.
- distinction between tender and offer to pay, 135.
- taking of additional security not a defense to promisor, 135.
- liability against promisor revived if payment or substituted security is void, 135.
- whatever releases principal will release promisor, 146.
- release of principal by operation of law, 147.
- where release of principal by operation of law is without fault or procurement of the creditor, 149.
- promisor may have judgment against him set aside if creditor fails to recover in subsequent action against principal, 148.
- coverture, insanity, infancy or other incapacity of principal, not available as defense to the promisor, 149.
- the false representation of third persons, whereby the promisor is induced to sign, not a defense, 159.

(The references are to pages.)

Suretyship Defenses—Continued—

set-off or counterclaim as a defense to the promisor, 178.

defenses based upon the right of the promisor to control the application of collateral, 181.

bond a nullity unless the instrument recites the debt, a promise to pay, a condition of defeasance, and the name of the obligee, 190.
want of consideration not a defense to suretyship contract under seal, 193.

alterations in bond as defense to surety, 214.

to actions upon appeal or stay bonds, 335.

to actions upon injunction bonds, 344.

to actions upon replevin bonds, 373.

to actions upon administration bonds, 384.

to actions upon bail bonds, 395.

Alteration of the principal contract, 98, 211.

which adds to or takes away some obligation already imposed, 98.
promisor discharged even though alterations are beneficial, 100n, 110.

change in the place of payment is material, 101.

changing the date of maturity of the principal contract as a defense, 101.

promisor discharged by material alterations in the principal contract whether such alterations are made before or after delivery of contract to creditor, 102.

same effect given to alterations whether made by debtor or creditor, 103.

changes or mutilation by a stranger not a defense to the promisor, 104.

alteration of contract as affected by the absence of fraudulent intent, 104.

immaterial alterations, though fraudulent, not a defense, 105.

addition of a new party as principal maker, a defense to promisor, 105.

addition of new party as surety or guarantor, not a defense, 106.

change in the duties of the principal as a defense to the promisor, 106, 212.

surety upon bond of public officer discharged by subsequent legislation changing duties of the office, 107a.

promisor discharged by alterations as to amount to be advanced by the creditor, 108.

failure to perform contract, not an alteration, 108.

Conditional contracts of suretyship, 163.

promisor not bound if conditions are not complied with, 163.

conditions precedent need not be in writing, 163.

conditions relating to the performance of the contract can not be shown by parol, 164.

conditions imposed by law need not be set out in the contract, 165.

waiver by the beneficiary of conditions imposed by law, 165.

the consideration of contract is not a condition and may be shown by parol, 166.

Extension of time, 114.

giving time to principal without the consent of promisor, 114.

extension agreement must be for a consideration, 115.

payment of obligations already due, not a consideration for extension, 116.

payment of interest in advance, 117.

promise to pay interest in advance, 117.

payment of usurious interest is a consideration, 117n.

execution of a note for usurious interest, a good consideration for extension, 118n.

(The references are to pages.)

Suretyship Defenses—Continued—

- not a defense if promisor is fully indemnified, 123.
- extension must be for a definite time, 119.
- execution and delivery of a note payable at a later date is an extension, 119n.
- will not be implied from the acceptance of collateral maturing at a later date, 120.
- extension of time by act of legislature, 121.
- extension to surety—effect upon co-surety, 122, 172.
- as a defense to persons in the situation of a surety, 124.
- by appeal or continuance of judicial proceedings, 127.
- with reservation against the promisor, does not discharge promisor, 128b.
- distinction between agreements not to sue and agreements to extend, 129.
- waiver of defense of extension, 130.
- promise to pay, with knowledge of the fact of extension, but in ignorance of the legal effect, is a waiver of extension, 130.
- Failure of creditor to sue principal*, 173.
 - promisor not discharged because the creditor fails to sue when requested, 174.
 - statutory provisions requiring creditor to sue on request of principal, 175.
 - bill in equity to compel creditor to proceed against principal, 176.
 - doctrine of Pain vs. Packard, 176.
- Fraud of the creditor*, 150.
 - practiced by the creditor upon the principal, 13, 148.
 - practiced against the promisor by the creditor, 14, 150.
 - secret stipulations between creditor and principal affecting the performance of the main contract, a fraud upon the promisor, 150.
 - concealment of material facts affecting the risk of the promisor, 152.
 - not a defense if the undisclosed facts were not known to the creditor, 154.
 - not required of creditor to disclose what he knows concerning the irregularities of principal in other transactions, 155.
 - constructive fraud, resulting from failure to disclose facts affecting the risk, coming to the knowledge of the creditor after the execution of the contract, 156.
 - insolvency of the principal need not be disclosed to promisor, 156.
 - breach of contract by principal need not be disclosed, 157.
 - creditor need not exercise diligence in watching the principal in the interest of the promisor, 158.
 - fraud can not be predicated upon a promise of the creditor, even though made without intent of fulfilling, 162.
- Fraud and misconduct of the principal*, 158.
 - does not invalidate suretyship contract, if without knowledge of creditor, 158.
 - creditor not bound to investigate as to whether promisor has been deceived, 159.
 - delivering suretyship obligations without complying with conditions, 159.
 - the doctrine of special agency as applied to delivery without complying with conditions, 160.
 - circumstances amounting to constructive notice of conditions, 160.
- Release of promisor by creditor*, 168.
 - may be shown by parol, 168.
 - creditor who has declared to promisor that contract is at an end, estopped from enforcing it, 168.

(The references are to pages.)

Suretyship Defenses—Continued—

release of co-surety discharges remaining surety to the extent of his right in contribution, 170, 498.

same, whether release voluntary or by operation of law, 171.

release of co-promisor, reserving rights against remaining promisor, not a defense, 172.

statutory provisions as to release of one of several co-promisors, 173.

① Release of security held by creditor, 137, 465.

possession of, or lien upon property of principal by the creditor, creates trust in favor of promisor, 138.

promisor discharged even if security of no value, under certain conditions, 139.

same effect whether release is voluntary or result of negligence, 140.

failure to file mortgage, 141, 465.

failure to foreclose mortgage, 141.

selling securities at a sacrifice, 143.

release of securities by operation of law, 143.

release of property of principal not held as security for suretyship debt, 145.

release of levy upon property of co-surety discharges remaining surety to the extent of right of contribution, 172.

Revocation, 184.

executory contract of suretyship revoked by notice, 184.

when death of promisor is a revocation, 184.

executed contract revocable only by mutual assent, 184.

death of promisor as a revocation of joint liability, at common law, 185.

T**Tacking Mortgages—**

rule as to tacking upon secured claims subsequent advances of the creditor, 446.

Telegram—

signature to, upon the blanks used by the sender is a sufficient compliance with the statute of frauds as to a "memorandum" signed by the party to be charged, 36.

Tender—

refusal to accept tender of payment made by principal will release promisor, 135.

distinction between tender and offer of payment, 135.

Tenure of Office—

extension of, by legislative act, 256.

Term of Court—

stipulation in bail bond to appear at next term of court, sufficiently definite, 392.

agreement between the principal and the prosecution postponing trial to some future term, releases sureties upon bail, 393.

Term of Office—

second bond given in same term of office, cumulative, 263.

when bond given for a term of office will cover defaults before delivery, 252.

liability of sureties where default of officer is partly in one term and partly in another, 263.

Trespass—

liability of sheriff or constable for trespass committed *colore officii*, 274.

(The references are to pages.)

Trust—

creditor invested with trust whenever property of the debtor applicable to the debt is placed in his control, 138.

Trust Funds—

may be followed and subjected in the right of the creditor by promisor paying the debt of another, 437.

subrogation not available in following trust funds where one receiving had no knowledge of the trust character, 437n.

U

Ultra Vires—

promisor will be bound if he signs with knowledge that main contract is *ultra vires*, 150.

when act of corporation becoming surety upon bond is *ultra vires*, 286, 353.

Unsoundness of Mind—

promisor must be of sound mind, 12, 246.

Usury—

payment of usurious interest in advance as a consideration for an extension of time to the principal, 117n, 118.

the execution of a note for usurious interest, a good consideration for an extension, 118n.

if note given in renewal is void on account of usury, the liability upon the original note is revived, 137.

V

Vendee—

when in the situation of a surety, 448.

Vendor—

in the situation of a surety who sells land subject to a mortgage, which the vendee assumes and agrees to pay, 25, 448.

Vendor's Lien—

surety for purchase price of land subrogated to, 437.

Venue, Change of—

where change of venue is ordered without statutory authority, failure of accused to appear is not a forfeiture of bail, 398.

Volunteer—

subrogation not available to one who pays the debt of another as a mere volunteer, 467.

agent advancing payment for account of his principal, not a volunteer, 469.

W

Wager (See Gambling Debt)—

Waiver—

of the defense of "extension of time," 130.

mere acquiescence by the promisor is not waiver, 131.

waiver by estoppel, 131.

(The references are to pages.)

Waiver—Continued—

- promise to pay deemed waiver of defense only when promise is made with knowledge of defense, 130.
- sureties may waive provisions of statute intended for their benefit, 165.
- acceptance of bond of public officer after the time fixed by law waives the right to declare the office vacant, 251.
- failure to make timely objection to defects in judicial bonds, considered a waiver, 320.
- consent of obligee to perfect appeal after date limited by law, a waiver of irregularity, 321.
- dismissal of injunction by consent, a waiver of defendant's right to damages, 340.
- of the benefits of subrogation, 472.
- involuntary waiver by delay in enforcing rights, 472.
- subrogation not waived by acceptance of other security from the debtor, 473.

Waste—

- creditor permitting security in his hands to be wasted, to the extent of the loss, releases promisor, 142.

Widow—

- surety of administration officer liable for failure of principal to pay to widow amount allowed by court, 377.

Wife (See Married Women)—**Writing—**

- contract of suretyship must be in writing, 2.
- as to whether the statute of frauds requires the consideration to be expressed in writing, 29, 30.
- statute of frauds does not require the entire contract to be in writing, but merely a "memorandum" of it, 33.
- not necessary that the authority of an agent to execute a suretyship contract be in writing, 24, 36.
- contract of indemnity need not be in writing, 37.
- waiver of defense to suretyship need not be in writing, 130.

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